Supreme Court, U.S.
FILED

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No.

In the Supreme Court
of the
United States

October Term, 1996

TIDEWATER MARINE WESTERN INC., ZAPATA GULF PACIFIC INC., OFFSHORE MARINE SERVICE ASSOCIATION, and METSON MARINE INC.,
Petitioners,

v.

LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA, and ALVIN ALLEN et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, labor law enforcement officials for the State of California, have attempted to regulate the maximum working hours of seamen serving on petitioners' United States documented vessels operating on the high seas and within state territorial waters off the coast of California. There are no California statutes which authorize wage and hour jurisdiction at sea, but the California Supreme Court has held that respondents may apply wage and hour administrative regulations within the state's territorial boundaries. In so doing, it has defined the state territorial seas as extending beyond the three-mile limits established by federal law. The questions for review are:

1. Are respondents' regulatory actions preempted by federal admiralty law, as set forth in the express exemption of seamen from land-based maximum hour standards in the Fair Labor Standards Act, 29 U.S.C. § 213(b)(6), seamen's maximum working hours set by the Shipping Act, 46 U.S.C. § 8104, and the constitutional requirement of uniform federal admiralty law established by *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and its progeny?

2. Can the State of California define its seaward boundaries beyond the three-mile limits set by *United States v. California*, 381 U.S. 139 (1965), and the Submerged Lands Act, 43 U.S.C. § 1311, in order to regulate working conditions on federally documented vessels operating on the high seas?

LIST OF PARTIES

The parties in the trial and appellate proceedings below were Tidewater Marine Western Inc., Zapata Gulf Pacific Inc., and Offshore Marine Service Association (plaintiffs at trial and respondents on appeal); Metson Marine Inc. and San Pedro Offshore Marine Inc. (plaintiff-intervenors at trial and respondents on appeal); and Labor Commissioner of the State of California, Division of Labor Standards Enforcement, Industrial Welfare Commission of the State of California, and Alvin Allen, et al. (defendants at trial and appellants on appeal).

Petitioners in this Court are Tidewater Marine Western Inc., Zapata Gulf Pacific Inc., Offshore Marine Service Association, and Metson Marine Inc. (collectively "Petitioners"). Respondents are Labor Commissioner of the State of California, Industrial Welfare Commission of the State of California, and Alvin Allen et al. San Pedro Offshore Marine Inc. has been omitted because petitioners believe it is no longer operating.

RULE 28.1 LIST OF RELATED CORPORATIONS

Petitioner Tidewater Marine Western Inc. has at all times relevant to this petition been a subsidiary of Tidewater Inc., a corporation whose stock is publicly traded. Petitioner Zapata Gulf Pacific Inc. is currently a subsidiary of Tidewater Inc., although it was an independently owned corporation during earlier legal proceedings. Tidewater Inc. has a number of other subsidiary corporations, but they are all wholly-owned subsidiaries.

Petitioner Offshore Marine Service Association is a non-profit corporation which acts as a trade association representing the interests of owners and operators of vessels engaged in offshore maritime services. Petitioner Metson Marine Inc. is not a publicly-traded corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tidewater Marine Western Inc. (Tidewater Western), Zapata Gulf Pacific Inc. (Zapata Pacific), Offshore Marine Service Association (OMSA), and Metson Marine Inc. (Metson Marine) pray that a writ of certiorari issue to review the December 19, 1996, judgment and opinion of the Supreme Court of the State of California.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 14 Cal.4th 557, 927 P.2d 296 (1996) and is reprinted in the Appendix at A-1. The opinions of the Court of Appeal of the State of California and the Superior Court of the County of Santa Barbara are not reported, but are reprinted in the Appendix at A-27 and A-41, respectively.

JURISDICTION

The judgment of the Supreme Court of the State of California was entered on December 19, 1996, reversing the trial court's judgment entered February 23, 1994, and affirming the unreported decision of the Court of Appeal, Second Appellate District, entered August 1, 1995. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257 by praying for a writ of certiorari to review the judgment of the California Supreme Court.

STATUTES AND REGULATIONS INVOLVED

The Fair Labor Standards Act exempts seamen from land-based maximum hour and overtime standards. It reads in relevant part:

> "The provisions of section 7 of this title [relating to maximum hours and overtime compensation] shall not apply with respect to * * *
>
> "(6) any employee employed as a seaman ... ." 29 U.S.C. § 213(b)(6).

The Shipping Act prescribes a 12-hour maximum workday for seamen on federally documented vessels. It reads in relevant part:

> "On an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing or fish tender vessel), a licensed individual may not be required to work

more than ... 12 of 24 hours at sea, except in an emergency when life or property are endangered." 46 U.S.C. § 8104(b).

California Wage Order 9-90 prescribes an 8-hour maximum workday for employees in the transportation industry, which includes seamen. It reads in relevant part:

"[E]mployees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay ... ." 8 CAL. CODE REGS. § 11090.3.

The Submerged Lands Act establishes a state's seaward boundaries at a point three miles from the mainland and all offshore islands, *excluding* all waters between the islands and mainland. It reads in relevant part:

"[I]n no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean ... ." 43 U.S.C. § 1301(b).

The California Government Code establishes the state's seaward boundaries at a point three miles beyond the outermost islands, *including* all waters between the islands and mainland. It reads in relevant part:

"All waters between the mainland and the outermost of the islands, reefs and rocks along and adjacent to the coast of the State of California ... are declared to be and to have been in the past inland waters of the State." CAL. GOVT. CODE § 171.

STATEMENT OF THE CASE

This case involves a direct clash between federal and state laws regulating maritime employment off the coast of California. Federal and California law adopt entirely different approaches toward the maximum work day of seamen, entitlement to overtime compensation, and even the limits of the state's territorial waters. Petitioners, who are at the intersection of these conflicting laws, seek review because the case involves important questions of federal maritime and constitutional law.

I. BACKGROUND

Since the beginning of minimum wage, maximum hour and overtime laws sixty years ago, federal law has expressly exempted seamen from statutory overtime requirements. This principle is embodied in Section 13(b)(6) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(6), a provision which Congress examined twice in extensive legislative hearings conducted in 1937 and 1961.[1] The seamen's exemption has been refined by interpretive regulations issued by the Department of Labor, 29 C.F.R. §§ 783.29 et seq., and by federal case law.

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[1] The FLSA originally exempted seamen from both minimum wage and overtime provisions. 52 STAT. 1067 § 13(a)(3), c. 676 (1938). In 1961 Congress amended the FLSA to apply the minimum wage to seamen but to continue their overtime exemption. 75 STAT. 71, §§ 9 & 10 (1961). During both legislative sessions, Congress recognized the overtime exemption was appropriate because of the variable and unscheduled working hours of seamen and the existing regulation of seamen's working conditions by federal maritime agencies. *E.g.*, *Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. 544-549 (1937); *Hearings on S. 256, S. 879, S. 895 and Bills Amending the FLSA Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 1st Sess. 376-379 (1961); S. REP. NO. 145, 87th Cong., 1st Sess. 32-33 (1961). *See also*, 29 C.F.R. § 783.0 et seq. (discussing the FLSA legislative history).

Federal cases and the FLSA legislative history have described two reasons for the longstanding exemption for seamen: (1) the pervasive degree of federal regulation which already exists over seamen's working conditions, hours of work, compensation and benefits, and (2) the variable and unpredictable nature of a seaman's workday, which does not lend itself to the rigid eight hour a day work standards inherent in land-based overtime regulations.[2]

Because of this extensive body of federal law, the seamen's exemption from maximum hour and overtime standards has become a firmly established fixture of admiralty law. With the exception of California, every state has followed and respected the federal overtime exemption for seamen. Twelve of the states have done so by express statutory provisions which largely incorporate Section 13(b)(6) of the FLSA.[3]

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[2] *E.g.*, *Lowrimoore v. Union Bag & Paper Co.*, 30 F.Supp. 647, 652 (S.D. Ga. 1939), *aff'd*, 116 F.2d 27 (5th Cir. 1940), *cert. denied*, 313 U.S. 559 (1941) ("A valid reason which seems to justify leaving seamen out of the effects of this Act is the practical difficulty of establishing by any satisfactory evidence what were their hours of work, when they as employees were always or nearly always subject to call, though a large and indeterminate portion of their time was not occupied with work."); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405, 407 n.6 (3d Cir. 1947) ("Seamen were exempted from operation of the Fair Labor Standards Act of 1938 so as to avoid conflict of jurisdiction and confusion of labor relations."); *Anderson v. Manhattan Lighterage Corp.*, 148 F.2d 971, 973 (2d Cir.), *cert. denied*, 326 U.S. 722 (1945) (same holding); *Weaver v. Pittsburgh Steamship Co.*, 153 F.2d 597 (6th Cir.), *cert. denied*, 328 U.S. 858 (1946) (noting that maritime unions strongly advocated the seamen's exemption to avoid confusion in jurisdiction and labor relations concerning maritime employees).

[3] ALASKA STAT. § 23.10.060; CONNECTICUT G.S.A. § 31-76(b); DISTRICT OF COLUMBIA CODE § 36-220.3(b)(1); HAWAII R.S. § 387-1(7); KANSAS S.A. § 44-1204(c)(1); KENTUCKY S.A. §§ 337.285 & 337.050(2)(b); MAINE R.S. § 664(3)(c); MASSACHUSETTS G.L.A., ch. 151, § 1A(10); MINNESOTA STAT. § 177.23(7)(17); NORTH CAROLINA G.S. § 95-25.14(c)(3); PENNSYLVANIA STAT. § 333.105(b)(1); WASHINGTON R.C. § 49.46.130(c).

Although seamen's overtime compensation has been expressly excluded from labor law statutes, the subject has long been addressed by federal admiralty law. From the very beginning of our nation's history, the terms and conditions of seafaring work have been governed by the employment agreement between master and seaman, as enforced and interpreted by federal law.[4] Seamen's overtime compensation has accordingly been treated as a matter of contract between master and seaman.[5] And when a seaman performs duties beyond the working period specified by contract, admiralty law recognizes an absolute right to fair compensation for the overtime performed.[6]

In addition, the Coast Guard regulates the maximum hours of work and specific working conditions of seamen serving on United States documented vessels. Following the standards set forth in the Shipping Act, the Coast Guard issues Certificates of Inspection which specify crewing requirements and the maximum hours of work at sea and in harbor conditions.[7] In the proceedings below,

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[4] *E.g.*, *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 46 (5th Cir. 1970); 1 NORRIS, THE LAW OF SEAMEN § 6:1 (4th ed. 1985).

[5] *The Youngstown*, 28 F.Supp. 197, 199 (E.D. La. 1939), *aff'd*, 110 F.2d 968, 970 (5th Cir. 1940); *Jones v. American Export Isbrandtsen Lines, Inc.*, 285 F.Supp. 345, 346-47 (S.D.N.Y. 1968); *Kane v. American Tankers Corporation of Delaware*, 219 F.2d 637, 639 (2d Cir. 1955); *C.M. Rousseau, Jr. v. Teledyne Movable Offshore, Inc.*, 619 F.Supp. 1513, 1518-19 (D. La. 1985), *rev'd in part on other grounds*, 805 F.2d 1245 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987); *see also*, *Smith v. Reinauer Oil Transport*, 256 F.2d 646, 652 (1st Cir. 1958).

[6] *The Lakme*, 93 F. 230, 231-32 (D. Wash. 1899); *Bender v. Waterman S.S. Corp.*, 69 F.Supp. 15, 19 (E.D.Penn. 1946); *The Carrier Dove*, 98 F. 313, 314 (D. Wash. 1899).

[7] 46 U.S.C. §§ 8101 & 8104, quoted at pp. 2-3, *supra*. Section 8104 is a recodification of 46 U.S.C. § 673, which was first enacted in 1915. See ch. 153, § 2, 38 Stat. 1164 (1915).

the Coast Guard Officer formerly in charge of the Southern California area submitted an undisputed declaration which described the Coast Guard's concern for the working conditions and maximum hours of work for seamen serving on all United States documented vessels.[8]

II. THE FACTS

This case arose in 1987, when California's labor law enforcement officials departed from the nation's uniform practice of excluding seamen from overtime regulation.[9] Using an internal interpretation of wage and hour regulations, respondents began applying California's general Wage Orders[10] to maritime employers operating off the coast of California.

The state statutes which regulate wages and hours of work explicitly limit jurisdiction to employment activities *within* the State of California; they do not grant authority over workers

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[8] Declaration of Captain Robert A. Janecek, USCG (Ret.), C.T. at 278-82. The declaration is reprinted in the Appendix at A-71.

[9] Under California law, the Labor Commissioner is the chief officer of the Division of Labor Standards Enforcement. The Labor Commissioner has authority to investigate employee complaints concerning wages, hours and working conditions, and to resolve the complaints through informal administrative hearings. CAL. LAB. CODE §§ 79-105.

[10] The state's minimum wage and maximum hour regulations, called "Wage Orders," are adopted by respondent Industrial Welfare Commission through public rulemaking proceedings. CAL. LAB. CODE §§ 1173 - 1182.1. The Wage Orders cover a number of industries and occupations, and Wage Order 9-90 applies to employees working in the transportation industry. 8 CAL. CODE REGS. § 11090.

employed at sea or beyond state boundaries.[11] Like the statutes, the Wage Orders do not address jurisdiction over workers employed at sea or beyond state boundaries.[12] Nevertheless, respondents used an internal manual to define the scope of the state's wage and hour jurisdiction at sea.[13] That manual was not adopted through public rulemaking or officially published among the state's formal rules and regulations.

Respondents applied these internal standards to petitioners, who are all involved in maritime activities off the coast of California. Petitioners Tidewater Western, Zapata Pacific and Metson Marine are traditional maritime firms that have operated in California for many years. Petitioner OMSA is a trade association representing the interests of owners and operators of vessels engaged in offshore maritime services.

Petitioners operate seagoing vessels which regularly travel more than three nautical miles off the coast of California. In the Santa Barbara Channel, the vessels principally transport crews and supplies to and from offshore oil drilling platforms lying from one

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[11] The statutes provide that the Labor Commissioner has enforcement authority over the hours and working conditions of all employees employed in any occupation "in the state," and they give the IWC regulatory authority over workers "employed in this state." CAL. LAB. CODE §§ 1193.5(a) & 1173.

[12] The transportation industry Wage Order simply states that it covers employees who work on "water," without any description of its territorial reach. 8 CAL. CODE REGS. § 11090.1 & .2(C).

[13] The manual provided that state wage and hour jurisdiction extended to vessels "operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California." C.T. at 356-58. The Labor Commissioner applied the provision expansively, believing that its maritime jurisdiction extended to any vessel operating between ports in California, without regard to how far off the coast the vessel travels, how long it is at sea, or how large it may be.

to twelve nautical miles off the coast. This involves traditional seafaring activity and travel between the platforms and local harbors. Petitioners perform these operations with large seagoing vessels that range from 65 to 217 feet in length, each equipped with a galley and living quarters for the crew. They operate 24 hours a day and may be called to duty at any time.

Crew members on petitioners' vessels are traditional seamen, performing maritime duties associated with navigation and operation of the vessels. They work on schedules that include duty or watch periods of 12 hours in 24-hour periods. Work is not constant during the watch periods, as vessels are frequently inactive and crews may sleep, eat or engage in their own pursuits during periods of inactivity. Although they are on watch for longer periods, crew members generally engage in work for no more than 8 hours in a 24-hour period.

Petitioners' vessels and crew are subject to pervasive and uniform federal regulations. All of the vessels are federally documented, all masters are licensed by the Coast Guard, and all crew members have Merchant Mariner documents issued by the Coast Guard. The Coast Guard inspects and issues a separate Certificate of Inspection for each vessel, which specifies the manning requirements for 24-hour operation, including the number of crew and their maximum hours of work.

Crew members on the vessels have always had employment agreements which provided for a flat daily rate of pay without overtime compensation. This is the traditional method of compensating seamen engaged in offshore maritime activity throughout the United States, reflecting their variable hours of work and prolonged periods of inactivity. This method of compensation — as well as the overall work patterns on offshore vessels — developed in response to the maximum working hours established by the Shipping Act and the seamen's overtime exemption under the FLSA.

III. THE LEGAL PROCEEDINGS

A. Federal Court

Because respondents' assertion of overtime jurisdiction threatened to disrupt the traditional maritime work patterns sanctioned by federal law, Tidewater Western, OMSA and other maritime employers initially challenged respondents' actions in a lawsuit based on federal grounds.[14]

In 1989, the District Court for the Central District of California declared that respondents' jurisdiction over maritime employees was preempted by federal maritime law and issued a permanent injunction prohibiting the enforcement of state overtime regulations. *Pacific Merchant Shipping Assn. v. Aubry*, 709 F.Supp. 1516 (C.D. Cal. 1989). In reaching this result, the District Court followed the constitutional requirement of a uniform system of admiralty law, citing this Court's decisions in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). The District Court found that uniformity was impossible because state and federal law "produce widely differing results" when applied to seamen. 709 F.Supp. at 1524.

In 1990, a three-judge panel of the Ninth Circuit Court of Appeals reversed the District Court's decision, with one judge dissenting. *Pacific Merchant Shipping Assn. v. Aubry*, 918 F.2d 1409 (9th Cir. 1990). The Ninth Circuit majority also considered whether the conflict between state and federal overtime standards violated the requirement of maritime uniformity, but concluded that the federal scheme of maritime regulation and interest in

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[14] Petitioners Zapata Pacific and Metson Marine were not parties to that action.

maritime uniformity were outweighed by California's interest in regulating seamen. 918 F.2d at 1425.

In July 1991, Tidewater Western and other parties in the federal case filed separate petitions in this Court for a writ of certiorari to review the Ninth Circuit's decision. *Tidewater Marine Service Inc. v. Aubry*, No. 91-142 and *Pacific Merchant Shipping Assn. v. Aubry*, No. 91-349. During extended consideration of the petitions, the Court asked the Solicitor General to express the views of the United States. 502 U.S. 1002.

The Solicitor General responded with a brief which described the case as one presenting "difficult and novel issues concerning a State's exercise of its traditional powers to regulate the minimum wages of its citizens in the context of maritime employment." App. at A-56.[15] The Solicitor General nevertheless concluded that "although this Court may ultimately need to resolve the issues presented, we do not believe that review is necessary at this time. Rather, it would be appropriate to defer judgment on the constitutional question ... at least until potentially dispositive state law issues have been addressed by the California state courts." *Id.*

The Court denied the petitions for certiorari in June 1992, 504 U.S. 979, and in July 1992 the District Court's injunction was vacated.

B. State Court

After the federal proceedings ended, respondents resumed their assertion of wage and hour jurisdiction over maritime employees. In addition, individual seamen filed 24 lawsuits in state court for recovery of overtime compensation against Tidewater Western, Zapata Pacific, Metson Marine, and seven other maritime firms.

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[15] The Solicitor General's brief is included in the Appendix at A-48.

The seamen claimed overtime compensation equal to millions of dollars in back pay liability.

Petitioners filed their own action against respondents for declaratory and injunctive relief, raising the state law issues which the Solicitor General identified as an impediment to this Court's review during the 1991 term. Petitioners' complaints alleged that the respondents were asserting wage and hour jurisdiction which exceeded statutory and administrative authorization under state law. Zapata Pacific and Metson Marine, which had not participated in the earlier federal case, also alleged that respondents' actions were preempted by federal admiralty law. C.T. at 13, 113 & 132.

In November 1993, the trial court granted summary judgment in favor of petitioners and enjoined the enforcement of state wage and hour laws at sea. Although following the Ninth Circuit's earlier determination that respondents' actions were not preempted by federal admiralty law, App. at A-42, the trial court struck down respondents' actions on state law grounds. In particular, the trial court concluded that there was no statutory or regulatory authority for state wage and hour jurisdiction to extend beyond the three-mile coastal boundaries established by federal law. *Id.* at A-42-43. The trial court ruled that the only source of such maritime jurisdiction was respondents' internal manual, which had not been adopted publicly and was therefore invalid and unenforceable under the California Administrative Procedures Act. *Id.* at A-43-46.

In August 1995, the Court of Appeal reversed the trial court in an unreported opinion. It followed the Ninth Circuit's earlier decision finding no preemption, and it held that state law permitted respondents to exercise maritime jurisdiction. App. at A-27.

The California Supreme Court granted discretionary review in November 1995 and issued its decision on December 19, 1996. The court's opinion fully analyzed federal admiralty preemption.

Like the Ninth Circuit, it concluded that California could exercise wage and hour jurisdiction over seagoing vessels because Congress had not expressed a "clear and manifest" intent to foreclose state regulation of seamen. App. at A-5-8 & 23-25.

On state law issues the court struck down respondents' internal manual defining the scope of wage and hour jurisdiction at sea, but nevertheless held that respondents could apply the Wage Orders to the fullest extent of the state's territorial seas. In defining California's seaward boundaries, the court rejected petitioners' contention that federal interests required the court to follow the three-mile limits set by *United States v. California*, 381 U.S. 139 (1965). The court instead applied the seaward boundaries defined by state law, which include the high seas between offshore islands and the mainland. With the benefit of this expansive state law boundary, the court held that respondents could regulate seamen's maximum hours of work on petitioners' vessels operating on federally-defined high seas. App. at A-5-7 & 21-23.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA SUPREME COURT HAS APPLIED AN ADMIRALTY PREEMPTION ANALYSIS THAT CONFLICTS WITH THIS COURT'S DECISIONS[16]

As we have explained, the subject of maximum hours and overtime compensation for seamen has not been excluded from federal admiralty law. It has instead been addressed in three ways: (1) seamen's overtime has historically been a matter of contract between master and seaman, (2) seamen's maximum hours of work have been regulated by the Shipping Act and the Coast Guard's manning standards and Certificates of Inspection,

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[16] This preemption argument is made by petitioners Zapata Pacific and Metson Marine, which were not parties to the *Pacific Merchant Shipping* case.

and (3) on two separate occasions Congress has specifically excluded seamen from the land-based overtime standards of the FLSA.[17]

The California Supreme Court has permitted respondents to supersede this body of federal admiralty law by regulating the maximum hours and overtime compensation of seamen. It has done so by applying a land-based Wage Order which is expressly limited to employment within the state's territorial boundaries and does not even address jurisdiction at sea. The court has reached this anomalous result with a preemption analysis that directly conflicts with decisions of this Court and establishes new standards for state regulation of maritime employment at sea. The end result is a decision of enormous importance and widespread impact within the maritime industry. Certiorari is accordingly proper and should be granted.

A. The California Supreme Court's Opinion Conflicts with *Jensen*'s Requirement of Maritime Uniformity

This Court has long emphasized the need for uniformity in federal admiralty law, based upon the federal courts' responsibility for "all cases of admiralty and maritime jurisdiction." U. S. Const., art. III, § 2, cl. 1. As the Court recently declared in *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1996):

> "One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed ... ."

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[17] See discussion, *supra*, at pages 4-7.

quoting *The Lottawanna*, 88 U.S. 558, 575 (1874). *Accord, Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

In the seminal case of *Southern Pacific Co. v. Jensen, supra*, 244 U.S. at 217, the Court made it clear that maritime uniformity is a requirement of constitutional dimensions. *Jensen* held that federal admiralty law preempted application of state workers' compensation laws to maritime employees working in New York Harbor, because "[t]he necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously impeded." *Accord, Yamaha Motor Corp., U.S.A. v. Calhoun*, ___U.S. ___, 116 S.Ct. 619, 628 n. 13 (1996) ("Permissible state regulation, we have recognized, must be consistent with federal maritime principles and policies."); *Knickerbocker Ice Co. v. Stewart, supra*, 253 U.S. at 166; *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 227-28 (1924).

The Court recently applied the *Jensen* requirement of maritime uniformity in *American Dredging Co. v. Miller, supra*, 510 U.S. at 447. There the Court drew the distinction between state actions that are procedural, and unlikely to affect maritime uniformity, and those which are substantive, and "establish a rule upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take." 510 U.S. at 454.

The state regulations in this case go to the heart of business management and other "primary conduct." Respondents are regulating the working conditions of seamen who serve on petitioners' United States documented vessels, and they are doing so in a manner that imposes prohibitive financial penalties for conduct that *meets* federal standards. Maritime uniformity is destroyed by a system of fragmented and conflicting laws which

differ greatly from federal admiralty law and which are subject to change from one state to another. This case is accordingly no different from *Jensen* and other decisions by this Court which have preempted fragmented state regulation of maritime activity.[18]

B. The California Supreme Court's Decision Incorrectly Requires Express Congressional Intent to Preclude State Regulation

The California Supreme Court's opinion conflicts with decisions of this Court not only in its overall holding, but also as to the particular form of preemption analysis which was applied. In analyzing preemption, the court said "our sole task is to ascertain the intent of Congress." App. at A-9, quoting *Calif. Federal S. & L. v. Guerra*, 479 U.S. 272, 280 (1987). The court also held that Congressional intent to preempt state regulation must be "clear and manifest." App. at A-9, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[19]

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[18] *E.g.*, *Offshore Logistics, Inc. v. Tallentire*, *supra*, 477 U.S. 207 (refusing to apply state law to oil platform workers killed on the high seas); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (refusing to apply Washington design standards for oil tankers); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (refusing to apply New York statute of frauds to seaman's oral contract concerning medical care); *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919) (refusing to apply California's statute of frauds to a seaman's oral contract of employment); *Lord v. Goodall*, 102 U.S. 541 (1881) (refusing to apply California contract law in place of admiralty rules limiting a vessel owner's liability in a breach of contract action for damage to cargo).

[19] This was the same preemption analysis employed by the Ninth Circuit's decision in *Pacific Merchant Shipping*, where that court held that "the historic powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress." 918 F.2d at 1416 (emphasis in original).

This exclusive focus on Congressional intent misses the critical test for maritime preemption.[20] It is true that this Court has held that state regulation of maritime conduct may be preempted through the familiar test of Congressional intent applied below by the California Supreme Court. *E.g.*, *Ray v. Atlantic Richfield Co.*, *supra*, 435 U.S. at 157-58. But in the context of maritime operations this Court's decisions have also emphasized a second dimension to preemption: the *practical consequences* of fragmented state regulation. Indeed, in *Jensen* and *Knickerbocker*, the Court refused to permit enforcement of workers' compensation laws in the face of express Congressional intent to *permit* state regulation — simply because the practical consequence would produce fragmentation and confusion.

The approach taken by the California Supreme Court also ignores the concept of "negative preemption" which this Court described in *Ray v. Atlantic Richfield Co.*, *supra*, 435 U.S. at 178:

> "The Court has previously recognized that 'where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved ...' States are not permitted to use their police power to enact such a regulation."

quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). *Accord*, *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926); *Norfolk & Western Ry. v. Pub. Utilities Comm.*, 926 F.2d 567, 570 (6th Cir. 1991); FRIEDELL, BENEDICT ON ADMIRALTY, § 112 (7th ed. rev. 1996), p. 7-37 ("As

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[20] The court's test also demands extraordinary foresight on the part of Congress. Because there were no states which even attempted to regulate overtime compensation for seamen in 1937 and 1961, Congress hardly had reason to consider the question of state preemption and express its views in "clear and manifest" language.

the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause of action it thereby deprives the defendant of a substantive right to be free of an obligation.").

This holding is certainly applicable here. Congress has expressly declared in Section 13(b)(6) of the FLSA that seamen should be exempt from land-based maximum hour and overtime standards. This was the product of legislative hearings in 1937 at which Congress accepted testimony about the peculiar and variable working hours of seamen and the dangers of confusion between maritime and labor regulations.[21] Congress reexamined the issue in 1961, concluding that only the FLSA minimum wage provisions should be extended to seamen.[22] In short, Congress did not leave out seamen because of oversight or neglect — it carefully and deliberately drew a line that excludes seamen from land-based overtime regulations.[23]

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[21] See legislative materials, *supra*, notes 1 & 2.

[22] When applying the minimum wage to seamen, Congress was careful to enact special provisions which recognize the unique working hours of seamen. Section 6(a)(4) of the FLSA accordingly prescribes a special minimum wage computation for seamen, based upon the hours they are "actually on duty" and not just on call. 29 U.S.C. § 206(a)(4). See also, S.REP. No. 145, 87th Cong., 1st Sess. 32-33 (1961) (explaining legislative intent).

[23] That line has been extended by a substantial body of law, consisting of federal regulations and court decisions, which define the precise scope of the seaman's exemption. Following the intent of Congress, they distinguish land-based and traditional seafaring activity by applying the seamen's exemption only to "one who performs service primarily to aid in the operation of a vessel as a means of transportation." *Worthington v. Icicle Seafoods, Inc.*, 774 F.2d 349, 353 (9th Cir. 1984), *vacated on other grounds*, 475 U.S. 709 (1986); *Donovan v. Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983); 29 C.F.R. § 783.29.

The underlying rationale for Congress' exclusion of seamen from the FLSA applies with even greater force to state overtime laws. Land-based labor standards, whether state or federal, are equally inappropriate for the variable workday of a seaman. There is much greater opportunity for confusion between labor and maritime regulations when multiple state jurisdictions are involved. Seagoing vessels are moving worksites, which regularly travel between territorial waters and the high seas and from one state's jurisdiction to another. Allowing states to regulate working conditions on vessels will necessarily cause fragmentation and conflict.

C. The California Supreme Court's Decision Incorrectly Elevates the State's Interest in Regulating Local Employment Over the Federal Interest in Uniform Operation of Vessels and their Crews

In upholding respondents' regulation of maximum hours of work for seamen, the California Supreme Court emphasized that state regulation was appropriate because the affected employees were California residents who worked on vessels operating in local waters off the California coast. App. at A-24-25. This aspect of the state court's preemption analysis is a sharp departure from this Court's decisions.

Federal admiralty jurisdiction includes all navigable waters which may be used in commerce.[24] This Court's decisions have recognized the need for maritime uniformity wherever admiralty jurisdiction extends, with equal attention to state territorial waters and the high seas. *E.g.*, *Moragne v. States Marine Lines, Inc.*,

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[24] *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 41 (1942) ("It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country."); G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY § 1-11 at 31 (2d ed. 1975).

398 U.S. 375 (1970) (establishing a uniform federal maritime remedy for wrongful death within state territorial waters).

This Court has recognized no lesser standard of preemption for vessels operating in local waters. *Lord v. Goodall, supra*, 102 U.S. 541, held that federal admiralty law preempted state statutes concerning a vessel which operated an exclusive route between San Francisco and San Diego off the coast of California. *London Co. v. Industrial Commission*, 279 U.S. 109 (1929), found preemption of state laws concerning an accident which occurred only 3/4 mile off the coast of California.

By the same token, the Court has applied preemption even when there are strong local contacts between a maritime transaction and a particular state. In *Union Fish Co. v. Erickson, supra*, 248 U.S. 308, the Court refused to apply California's statute of frauds to a seaman's oral contract of employment made within the state, holding that maritime uniformity would have been defeated by fragmented state regulation. The Court reaffirmed that holding more than forty years later in the face of even stronger local contacts in *Kossick v. United Fruit Co., supra*, 365 U.S. 731.

The federal interest in the uniform operation of maritime law has found its greatest expression in cases involving "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 344 (1973). This certainly applies here, for this is a case involving matters which go to the heart of the relationship between a vessel and its crew. Respondents are directly regulating working conditions on board petitioners' vessels, by imposing maximum working hours for crew members.[25]

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[25] The state interests in this case are also weak and poorly defined. The California Legislature has not authorized respondents' activities, as the relevant statutes do not authorize jurisdiction at sea and are in fact limited to working

II. THE CALIFORNIA SUPREME COURT HAS REDEFINED THE BOUNDARIES OF STATE TERRITORIAL SEAS, PERMITTING EXPANSIVE REGULATION OF MARITIME ACTIVITY ON THE HIGH SEAS

In *United States v. California*, *supra*, 381 U.S. at 165-66, this Court held that a state's seaward boundaries extend three miles from its shoreline under the terms of the Submerged Lands Act, 43 U.S.C. §§ 1311 *et seq*. Applying the Act specifically to California, the Court held that the high seas between the three-mile belt around offshore islands and the mainland are federal waters beyond the state's boundaries. *Id.*

The location of California's seaward boundary is a critical issue in this case. The statutes which establish respondents' regulatory powers only authorize jurisdiction *within* the state's territorial boundaries. CAL. LAB. CODE §§ 1173 & 1193.5(a). All of the courts below therefore concluded that the state territorial seas defined the limits of respondents' regulatory authority. App. at A-23-25, 33-35, & 42-44. While the courts all agreed with that proposition, they adopted entirely different locations for the state's seaward boundaries and territorial seas.

The trial court followed the three-mile seaward boundaries established by federal law, concluding that respondents had no power to regulate working conditions on vessels operating on the high seas between offshore islands and the California coastline. App. at A-42-43. The California Supreme Court (like the Court of Appeal, see App. at A-35) declined to follow the federal boundaries. It applied the boundaries defined by state law, which include the high seas between the offshore islands and mainland.

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conditions "in the state." Similarly, the relevant Wage Order does not address ships or jurisdiction at sea. The only explicit standard for maritime jurisdiction was an internal manual, which the California Supreme Court has struck down.

The court accordingly held that respondents could regulate working conditions on the high seas — no differently than worksites on shore or on inland lakes and rivers. App. at A-6-8 & 23-25. There can be no justification for the California Supreme's refusal to follow and apply the state's federally defined boundaries.

The three-mile limit is a firmly-established principle of law, which this Court has applied without exception to establish the location of a state's seaward boundaries and the limits of state territorial seas. *E.g.*, *United States v. Alaska*, 503 U.S. 569, 584 (1992); *Secretary of Interior v. California*, 464 U.S. 312, 315 (1984); *United States v. Alaska*, 422 U.S. 184, 188 (1975). In *United States v. California*, *supra*, 381 U.S. at 171-72, the Court specifically held that the high seas of the Santa Barbara Channel — the precise area where this case arose — were federal waters beyond California's seaward boundaries.

The three mile limit is an accepted and widely followed demarcation between state and federal jurisdictions. In the lower courts, respondents *themselves* agreed that California's seaward boundaries were governed by federal law and excluded the high seas between the mainland and offshore islands. C.T. at 646; DLSE Ct. App. Br. at 4. The California Supreme Court's departure from this federal demarcation is totally at odds with the accepted and traditional rules that govern maritime affairs.

This Court has repeatedly recognized that federal interests are paramount and exclusive on the high seas beyond the three mile territorial limits. In the *United States v. California* decisions, the Court held that "national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt," 332 U.S. at 36, and the Court decreed that the seas beyond three miles "have appertained and now appertain to the United States, and have been and now are subject to its *exclusive* jurisdiction," 382 U.S. at 449 (emphasis added). The

California Supreme Court has disregarded these federal interests, by redefining the high seas as its own territorial waters in order to permit state regulation of shipboard activity.

The California Supreme Court's disregard of federal interests is particularly wrong in this case. Petitioners operate commercial seagoing vessels whose working hours and other operations are subject to pervasive federal regulations. The vessels are all documented under the laws of the United States, all crew are licensed by the Coast Guard, all shipboard operations are regulated by the Coast Guard, and the vessels operate daily in federal waters. With such strong federal interests involved, there is simply no basis to employ state-defined boundaries to permit state regulatory activities on the high seas.

In deciding issues involving the relations between crew members and federally documented vessels operating on the high seas, this Court has consistently applied federal rather than state law. For example, in *Oil Workers v. Mobil Oil Corp.*, *supra*, 426 U.S. 407, this Court decided whether the National Labor Relations Act savings clause, 29 U.S.C. § 164(b), permitted application of the Texas right-to-work laws to seamen employed on United States documented oil tankers operating principally on the high seas. The lower courts held that Texas law applied because of the substantial state interests in regulating the seamen's employment and the predominant state contacts with the hiring and employment process. This Court reversed, holding that the predominant job situs was the proper standard for measuring applicability of state law. Since the vessels operated primarily on the high seas, the Court held that neither Texas nor any other state had a sufficient interest to regulate the relationship between a vessel and its crew. 426 U.S. at 412-21. *Accord, Offshore Logistics, Inc. v. Tallentire*, *supra*, 477 U.S. at 220-33.

Because of the strong local interest in protecting the shoreline from environmental harm, some of this Court's decisions have permitted limited state regulation of shipboard activity — but only

within the three-mile state territorial zone. *See Ray v. Atlantic Richfield Co.*, *supra*, 435 U.S. 151 (permitting application of state statute concerning tug-escorts to certain tankers in confined waters); *Askew v. American Waterways Operators, Inc.*, *supra*, 411 U.S. 325 (permitting application of state statute concerning oil spill damage to the shoreline); *Huron v. Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (permitting application of city air pollution regulations to tankers within a harbor).[26]

The California Supreme Court's decision dramatically expands this limited authority. By following the state's own unique definition of its seaward boundaries, it expands the state's territorial seas and permits state regulation of working conditions on the high seas. That expansive result is inconsistent with this Court's decisions and with the clear and uniform seaward boundaries established by federal law.

III. REVIEW BY THIS COURT IS APPROPRIATE AND NECESSARY

A. The Case is Ripe for Supreme Court Review

During the 1991 term, the Solicitor General described the preemption issues in this case as presenting "difficult and novel issues concerning a State's exercise of its traditional powers to regulate the minimum wages of its citizens in the context of

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[26] Other cases contain dictum which suggests that the states may exercise police powers beyond their territorial seas. *See Skiriotes v. Florida*, 313 U.S. 69, 75 (1941) (laws restricting state citizens engaged in sponge farming in state and federal waters), and *Toomer v. Witsell*, 334 U.S. 385, 393 (1948) (laws restricting state citizens engaged in shrimping in state and federal waters). These cases were decided before the Court's clear demarcation of federal/state boundaries in cases such as *United States v. California*, and the enactment of the Submerged Lands Act. They also relate to fishing and preservation of natural resources, a traditional concern of the states, and not to the regulation of shipboard working conditions, which is a traditional federal concern.

maritime employment." App. at A-56. The Solicitor General also recognized the merit of petitioners' arguments against state overtime regulations:

> "[T]here is, we believe, considerable force to petitioners' arguments that state law should not apply to their operations. The interest in the uniformity of maritime law has retained the greatest force with respect to 'suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews.' In terms of their effect on vessels and their crews, overtime compensation laws are in many respects similar to the workers' compensation law at issue in *Jensen* itself, and the state statute of frauds that this Court held could not bar a seaman from recovering damages under an oral contract with a vessel owner in *Kossick v. United Fruit Co.*" App. at A-66 (citations omitted).

Despite the strength of these points, the Solicitor General concluded that "although this Court may ultimately need to resolve the issues presented," it was appropriate to defer review "at least until potentially dispositive state law issues have been addressed by the California state courts." App. at A-56.

Those state law issues have now been decided, and the California Supreme Court has done so in a manner that enhances the clash between the federal and state interests in this case. Review by this Court is appropriate now, and should be granted.

B. State Regulation of Seamen's Overtime Will Have Great Impact in the Maritime Industry

This is by no means a case with limited importance or application. Because these proceedings arose in California, this case necessarily has a great impact on the United States maritime industry. According to figures compiled by the Bureau of Labor

Statistics, more than 9.59% of all United States maritime employees are based in California.[27]

The State of California has a similarly disproportionate share of maritime employees in the offshore sub-industries that will be most affected by respondents' overtime jurisdiction: water transportation services (10.56% of all U.S. employees), water passenger transportation (7.75% of all U.S. employees), water ferries (8.58% of all U.S. employees), marine cargo handling (14.17% of all U.S. employees), and towing and tugboat services (4.45% of all U.S. employees). *Id.*

The California Supreme Court's decision has accordingly removed the longstanding seamen's exemption for approximately one out of every ten offshore maritime employees in the United States. The impact will of course be greater if additional states apply their overtime provisions to maritime employees.

From an economic and operational standpoint, the California Supreme Court's decision will also have an enormous impact on maritime employers. The Shipping Act, 46 U.S.C. § 8104(b), and Coast Guard Certificates of Inspection for offshore vessels now set a maximum work period of twelve hours per day on crew and supply vessels like those operated by petitioners. As the Coast Guard Officer who submitted a declaration to the trial court explained, reliance upon these federal standards has created an accepted and customary twelve hour work day throughout the offshore maritime industry.[28]

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[27] U.S. Dept. of Labor, Bureau of Labor Statistics, Employment & Wages Annual Averages 1994 (Bull. 2467, November 1995) at pp. 330-35.

[28] Declaration of Capt. Robert Janecek, App. at A-74-75 ("In all of the years I have been involved in supervising the manning requirements for crew boats and supply boats of the type operated by Tidewater, I have always considered and understood the twelve hour shift to be the normal workday for seamen (including officers) serving on these type vessels.").

Continuing these customary practices in the face of respondents' state overtime regulations is simply not a feasible alternative. The California Wage Order requires premium overtime pay at one and one-half or two times the regular rate of pay for work exceeding eight hours in any day, the first eight hours on the seventh day of work, and forty hours in any week. 8 CAL. CODE REGS. § 11090.3. The customary twelve hour workday would therefore produce at least four hours of premium pay each day (or six additional hours of regular pay at the one and one-half overtime rate) — resulting in seamen earning considerably more than the *captain* of their vessels.

The economic pressures caused by respondents' maximum hour standards would accordingly require maritime employers to restructure seamen's work periods to come closer to the land-based standards prescribed by the California Wage Order, without regard to the operational needs of the vessels or their work. This will necessarily require premium overtime pay, the employment of a greater number of seamen, and correspondingly higher costs to maritime employers. The practical consequences of respondents' actions are enormous.[29]

C. This Court's Guidance is Needed

The limits of *Southern Pacific Co. v. Jensen* and federal admiralty preemption is an area known for its confusion and uncertainty.[30] The principles established by the Ninth Circuit's

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[29] For this reason it may be *theoretically* true, as the California Supreme Court suggested, that the California overtime laws do not absolutely foreclose the 12-hour seamen's workday that is prescribed by 46 U.S.C. § 8104(b). However, as a *practical* matter the economic costs of the state overtime regulations are so great that they will totally displace federal standards on the vessels.

[30] As the Court stated in *American Dredging Co. v. Miller*, *supra*, 510 U.S. at 452, "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty

decision in *Pacific Merchant Shipping* and the California Supreme Court's present decision will only add to that confusion. The preemption analysis in *Pacific Merchant Shipping* has been sharply criticized,[31] and several courts (including the Ninth Circuit) have distinguished the decision in admiralty preemption cases involving similar claims and arguments.[32]

This case presents the Court with the opportunity to clarify a difficult area and correct an improper result. Review should be granted.

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jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." *See also*, Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158 (1960); Ruhl, *Finding Federalism in the Admiralty: 'The Devil's Own Mess' Revisited*, 12 TUL. MARITIME L.J. 263 (1988).

[31] Comment, "Uniformity--State Wage and Hour Laws," 23 J. MARITIME LAW & COMMERCE 635 (1992).

[32] *See Fuller v. Golden Age Fisheries*, 14 F.3d 1405, 1409 (9th Cir. 1994) (Alaska minimum wage and overtime statute preempted); *Long v. F/V Melanie*, 918 F.Supp. 323, 326 (W.D. Wash. 1996) (Washington statute prohibiting unlawful withholding of wages preempted); *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 268 (Wash. 1993) (state product liability laws preempted).

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and necessary. Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed December 19, 1996

IN THE SUPREME COURT OF CALIFORNIA

TIDEWATER MARINE WESTERN, INC., et al.,	)	
Plaintiffs and Respondents,	)	
v.	)	S048739
VICTORIA L. BRADSHAW, as Labor Commissioner, etc., et al.,	)	Ct. App. No. 2/6 B082689
Defendants and Appellants.	)	Santa Barbara County Super. Ct. No. 195103

In this case, we decide whether the wage orders of the Industrial Welfare Commission (IWC) govern employment in the Santa Barbara Channel. To decide that question, we must decide, among other things, whether written interpretive policies of the state agency charged with enforcing IWC wage orders constitute regulations within the meaning of the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). We conclude that these interpretive policies do constitute regulations and therefore are void because they were not adopted in accordance with the APA. Nevertheless, we conclude that the agency properly exercised its enforcement jurisdiction and that the trial court erred in granting a permanent injunction barring enforcement. Accordingly, we affirm the judgment of the Court of Appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Tidewater Marine Western, Inc. (Tidewater), and Zapata Gulf Pacific, Inc. (Zapata), are maritime firms that transport (or transported) workers and supplies from the California coast to oil-drilling platforms located in the Santa Barbara Channel. Plaintiff Offshore Marine Service Association (OMSA) is a trade association representing the owners and operators of vessels engaged in offshore marine services. The crew members who work for Tidewater and Zapata in the Santa Barbara Channel reside in California. They are on duty 12 hours during a 24-hour period, but the demands of work are inconstant, and crew members may spend part of this duty period engaged in leisure activities. Zapata and Tidewater compensate their crew members at a flat daily rate of pay without special compensation for "overtime."

Defendant IWC is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California. (Lab. Code, §§ 1173, 1178.5, 1182.) Defendant Division of Labor Standards Enforcement (DLSE), headed by defendant Victoria L. Bradshaw, as Labor Commissioner, is the state agency empowered to enforce California's labor laws, including IWC wage orders. (Lab. Code, §§ 21, 61, 95, 98-98.7, 1193.5.) IWC wage order No. 4-89 governs employees "in professional, *technical*, clerical, *mechanical*, and similar occupations . . . unless such occupation is performed in an industry covered by an industry order of this Commission." (Cal. Code Regs., tit. 8, § 11040, subd. 1, italics added.) IWC wage order No. 9-90 governs employees in the transportation industry, which includes "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or *water*, and all operations and services in connection therewith . . . ." (Cal. Code Regs., tit. 8, § 11090, subd. 2(C), italics added.) Wage orders Nos. 4-89 and 9-90 both bar work in

excess of eight hours in any twenty-four-hour period unless the employer pays "overtime," which is generally "[o]ne and one-half (1 1/2) times the employee's regular rate of pay," increasing to "[d]ouble the employee's regular rate of pay for all hours worked in excess of twelve (12) hours." (Cal. Code Regs., tit. 8, §§ 11040, subds. 3(A)(1), 3(A)(2), 11090, subds. 3(A)(1), 3(A)(2).)

Starting about 1978, employees in the maritime industry began filing claims with the DLSE. The DLSE determined on a case-by-case basis whether state labor laws applied to these employees, considering such factors as the type of vessel, the nature of its activities, how far it traveled from the California coast, how long it was at sea, and whether it left from and returned to the same port. The DLSE also considered contacts, if any, between the employees and California, such as whether the employees entered into their employment contracts in California, resided in California, owned property in California, paid taxes in California, made regular purchases in California, sent their children to California schools, or spent significant time in California. The DLSE eventually replaced this case-by-case adjudication with a written enforcement policy, which provides: "IWC standards apply to crews of fishing boats, cruise boats, and similar vessels operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California." In the early 1980's, this written policy existed only in a draft policy manual the DLSE prepared for the guidance of deputy labor commissioners. In 1989, however, the DLSE prepared a formal "Operations and Procedures Manual" incorporating the same policy and made that manual available to the public on request. The manual reflected "an effort to organize . . . interpretive and enforcement policies" of the agency and "achieve some measure of uniformity from one office to the next." The DLSE prepared its policy manuals internally, without input from affected employers, employees, or the public generally.

In 1987, the DLSE began applying IWC wage order No. 4-80, the predecessor to wage order No. 4-89, to maritime employees working in the Santa Barbara Channel. Various shipping associations, including OMSA, brought an action in federal court, seeking an injunction curtailing enforcement of California's labor laws, and Tidewater intervened in that action. (*Pacific Merchant Shipping Ass'n v. Aubry* (C.D.Cal. 1989) 709 F.Supp. 1516.) Among other things, the plaintiffs asserted that the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) preempted California's attempt to regulate the overtime pay of certain maritime employees. The FLSA requires employers engaged in "commerce" to pay overtime wages to their employees (29 U.S.C. § 207), but the FLSA includes an express exception for seamen. (29 U.S.C. § 213(b)(6).) This exception covers Tidewater's and Zapata's crew members. The plaintiffs asserted that the exception evidenced congressional intent to preempt state laws mandating overtime pay for seamen. The plaintiffs also argued that federal law and Coast Guard regulations provided seamen with ample protection. (See, e.g., 46 U.S.C. §§ 8101, 8104; 46 C.F.R. § 15.101 et seq. (1995).)

The federal district court issued an injunction, but the Ninth Circuit Court of Appeals reversed. (*Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, cert. den. (1992) 504 U.S. 979.) The Ninth Circuit held that federal law did not preempt the IWC wage orders governing overtime wages, but the court expressly did not decide whether the IWC wage orders were enforceable against maritime employers under state law. (*Id.* at p. 1425.)

Starting in 1992, various employees of Tidewater and Zapata working aboard boats operating in the Santa Barbara Channel filed suits in Santa Barbara Superior Court, seeking retroactive overtime pay. Plaintiffs responded by filing this action, again asking for an injunction curtailing enforcement of the IWC wage orders governing overtime pay.

Plaintiffs argue that the Legislature did not intend the IWC's jurisdiction to extend beyond California's federal law boundaries. Plaintiffs also renew their argument that federal law preempts state law. Finally, plaintiffs assert that the provision in the DLSE's Operations and Procedures Manual that interprets the IWC wage orders as applying to Tidewater's and Zapata's operations in the Santa Barbara Channel is an "underground regulation" that was not issued in accordance with the APA and is therefore void.

The superior court granted an injunction barring application of IWC wage orders to Tidewater's and Zapata's employees working more than three miles off the coast, but the Court of Appeal reversed. The Court of Appeal held, among other things, that the relevant provision of the DLSE's Operations and Procedures Manual was not a regulation subject to the rulemaking procedures of the APA, but merely an "interpretation" that "applies the wage order to a specific group of employers." We granted review, and, though we disagree with some of the Court of Appeal's reasoning, we affirm.

II. DISCUSSION

Though the superior court's injunction covered Tidewater's and Zapata's employees working *anywhere* more than three miles from the California coast, the Court of Appeal focused on those employees who are named defendants in this action and who work in the Santa Barbara Channel. Because we are reviewing the decision of the Court of Appeal, our focus is also on Tidewater's and Zapata's operations in the Santa Barbara Channel. At issue, of course, is whether IWC wage orders apply to those operations.

A. Federal Law Does Not Bar California From Regulating Maritime Employment in the Santa Barbara Channel

As an initial matter, we consider whether federal law precludes the IWC from regulating maritime employment in the Santa

Barbara Channel. If it does, then we need not consider whether the IWC attempted to do so when it adopted wage orders Nos. 4-89 and 9-90.

1. California has the power to regulate employment outside its federal law boundaries

Under state law, California's territorial boundaries extend three nautical miles beyond the outermost islands, reefs, and rocks, and include all waters between those islands and the coast. (Cal. Const., art. III, § 2; Gov. Code, §§ 170, 171; *People v. Weeren* (1980) 26 Cal.3d 654, 661 (*Weeren*).) Under this state law definition of California's boundaries, the entire Santa Barbara Channel is within the state. On the other hand, federal law defines California's territorial boundaries more narrowly, extending three nautical miles from the coast, and including a three-mile-wide band around any islands lying off the coast, but excluding waters between the islands and the coast. (43 U.S.C. §§ 1301(b), 1312.) Under this federal law definition of California's boundaries, the central portion of the Santa Barbara Channel is not within the state. (*United States v. California* (1965) 381 U.S. 139, 169-171.)

In defining California's federal law boundaries, Congress did not, however, suggest that California lacked power to regulate conduct outside those boundaries and within broader state law boundaries. (*Weeren*, *supra*, 26 Cal.3d at p. 666.) Congress adopted the statute defining California's federal law boundaries in response to the United States Supreme Court's opinion in *United States v. California* (1947) 332 U.S. 19 (supplemental opn. at 332 U.S. 804). In that case, the State of California and the United States disputed the ownership of the land, and more significantly the minerals, adjacent to the coast and underlying the Pacific Ocean. The Supreme Court held that, with the exception of bays, all the land seaward of the low-water mark belonged to the United States. (332 U.S. at p. 805.) Nevertheless, the high court

expressly conceded that California is "authorized to exercise local police power functions" within the territory found to belong to the United States. (332 U.S. at p. 36.) Congress responded to the high court's decision by enacting the Submerged Lands Act (43 U.S.C. § 1301 et seq.), which defined California's boundaries as extending three geographical miles seaward of the low-water line, and which transferred to California ownership of the underwater lands located within its boundaries.

In *Weeren*, we considered the applicability of California's criminal laws in the territory beyond California's federal law boundaries but within its state law boundaries. We stated the federal law boundaries apply "when the extent of a state's territorial jurisdiction is relevant to the operation of federal law." (*Weeren*, *supra*, 26 Cal.3d at p. 660.) Thus, federal law defines "the state's 'boundaries' for *all* purposes, political and proprietary, 'as between Nation and State.'" (*Id.* at p. 663.) On the other hand, where state criminal law does not conflict with federal law, "the state boundaries as defined by our state Constitution and statutes . . . are the limits to which the Legislature implicitly intended to extend California's criminal laws . . . ." (*Id.* at p. 669.) Thus, we did not interpret the federal law boundaries as limiting the state's power to regulate conduct outside those boundaries and within broader state law boundaries. Like the criminal laws at issue in *Weeren*, California employment laws implicitly extend to employment occurring within California's *state law* boundaries, including all of the Santa Barbara Channel. The federal law boundaries would have precedence only if the operation of federal law were at issue, as for example if federal law conflicted with state law. (*Id.* at p. 670.)

Moreover, even if California had not defined (or could not define) its boundaries more broadly than does federal law, nothing precludes a state from regulating conduct beyond its borders. (*Smith v. United States* (1993) 507 U.S. 197, 213; *Skiriotes v. Florida* (1941) 313 U.S. 69; *Weeren*, *supra*, 26 Cal.3d at p. 666.)

Skiriotes involved a Florida law prohibiting the use of certain diving equipment in taking commercial sponges from the Gulf of Mexico. The trial court convicted Lambiris Skiriotes of violating this law. Skiriotes argued on appeal that he used the equipment more than three miles from the coast and therefore outside Florida's boundaries as defined in certain federal treaties. Florida asserted that Skiriotes's activities were within its boundaries because, regardless of federal treaties, its boundaries extended nine nautical miles from the coast. The high court thought the dispute over Florida's boundaries irrelevant, stating: "Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place." (*Skiriotes v. Florida*, *supra*, 313 U.S. at p. 76.) "[W]e see no reason why the State of Florida may not . . . govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. . . . [T]he State of Florida has retained the status of a sovereign." (*Id.* at p. 77.) Similarly, regardless of its boundaries, California can govern employment of its residents on the high seas, provided there is no conflict with federal law.

2. *Federal law does not conflict with or otherwise preempt state regulation of seamen's overtime pay*

In a reprise of the argument OMSA and Tidewater made to the federal courts, plaintiffs here argue that the FLSA conflicts with or otherwise preempts state regulation of the overtime pay of seamen, including Tidewater's and Zapata's employees in the Santa Barbara Channel. Of course, the Ninth Circuit's decision finding no preemption binds OMSA and Tidewater, who were parties to the federal action. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807.) Zapata does not persuade us that the Ninth Circuit's decision was wrong.

As discussed above, the FLSA requires employers engaged in "commerce" to pay overtime wages to their employees (29 U.S.C. § 207), but the FLSA includes an express exemption for seamen. (29 U.S.C. § 213(b)(6).) Zapata asserts that this exemption is not merely the absence of federal regulation under the FLSA, but an affirmative preemption of state regulation. In support of this assertion, Zapata argues that regulating the overtime of seamen would be impractical because of the variable and unpredictable nature of their workdays. Zapata also argues that general principles of federal admiralty law regulate the hours and working conditions of maritime workers, including a right to "a reasonable amount of extra wages" for overtime. (See *Bender v. Waterman S. S. Corporation* (E.D. Pa. 1946) 69 F.Supp. 15, 19, affd. (3d Cir. 1948) 166 F.2d 428; *The Carrier Dove* (N.D.Wash. 1899) 98 Fed. 313, 314; *The Lakme* (N.D.Wash. 1899) 93 Fed. 230, 232.) Zapata asserts that the FLSA's exemption for seamen is part of the fabric of federal admiralty law, which, in the interest of uniformity, generally preempts state law. (See *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205 [federal admiralty law preempts state workers' compensation law]; see also *Offshore Logistics, Inc. v. Tallentire* (1986) 477 U.S. 207; *Oil Workers v. Mobil Oil Corp.* (1976) 426 U.S. 407; *Knickerbocker Ice Co. v. Stewart* (1920) 253 U.S. 149.)

In pressing these arguments, Zapata skirts the analytical framework generally applicable to preemption questions. In determining whether federal law preempts state law, "our sole task is to ascertain the intent of Congress." (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 280 (*Guerra*).) Moreover, this intent must be "clear and manifest." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.) Preemption may occur in three situations: (1) where the federal law expressly so states, (2) where the federal law is so comprehensive that it leaves "'no room' for supplementary state regulation," or (3) where the federal and state laws "actually conflict[]." (*Guerra, supra*, 479 U.S. at pp. 280-281.)

Here, not only does the FLSA leave "room" for supplementary state regulation of overtime, the FLSA expressly indicates that it does *not* preempt this regulation. The FLSA includes a "savings clause," which provides: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any . . . State law or municipal ordinance establishing . . . a maximum workweek lower than the maximum workweek established under this chapter . . . ." (29 U.S.C. § 218(a).) The federal courts that have addressed this question have interpreted this savings clause as expressly permitting states to regulate overtime wages. (See, e.g., *Overnite Transp. Co. v. Tianti* (2d Cir. 1991) 926 F.2d 220, 222 ["state overtime wage law is not preempted by . . . the FLSA"]; *Pacific Merchant Shipping Ass'n v. Aubry, supra*, 918 F.2d at p. 1422 ["Congress has specifically allowed states to enforce overtime laws more generous than the FLSA," citing the savings clause]; *Pettis Moving Co., Inc. v. Roberts* (2d Cir. 1986) 784 F.2d 439, 441 [savings clause "explicitly permits states to set more stringent overtime provisions than the FLSA"]; and *Williams v. W. M. A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258, 1261 [savings clause "permits state laws to operate even as to workers exempt from FLSA"].)

Moreover, no provision of the FLSA "actually conflicts" with California law. The FLSA does not expressly preclude states from regulating the overtime wages of seamen, and the legislative history of the FLSA does not suggest an implicit preclusion. The legislative history indicates that Congress added the exemption for seamen at the request of labor unions representing seamen. The unions were concerned that regulating the employment of seamen under the FLSA would conflict with other federal laws protecting seamen. (29 C.F.R. § 783.29 (1996) [describing legislative history of the FLSA's seaman exemption].) Thus, the seamen exemption appears to have had no purpose other than to negate the regulatory effect the FLSA would otherwise have had on the employment of seamen, not to create an affirmative bar against state regulation of that employment. In sum, we find no evidence

that Congress intended the FLSA's seamen exemption to preempt state law.

Having determined that federal law permits California to regulate maritime employment in the Santa Barbara Channel, we next consider whether California exercised this power by way of IWC wage orders Nos. 4-89 and 9-90. Of course, the DLSE Operations and Procedures Manual addresses this question, and we must "accord[] great weight and respect" to a valid administrative construction of a controlling statute or regulation. (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7.) Thus, before construing the applicable legal provisions on our own, we must determine whether the DLSE's construction of those provisions is valid and therefore entitled to deference.

B. The DLSE's Policy for Determining Whether IWC Wage Orders Apply to Maritime Employers Is Void for Failure to Follow the APA

The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).

One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation

(*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205 (*Armistead*)), as well as notice of the law's requirements so that they can conform their conduct accordingly (*Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583, 588 (*Ligon*)). The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. (See *San Diego Nursery Co. v. Agricultural Labor Relations Bd.* (1979) 100 Cal.App.3d 128, 142-143.)

The Labor Code includes regulatory procedures analogous to those in the APA, but applicable only to the IWC. For example, the IWC must hold a public hearing when it investigates the adequacy of wages or employment conditions in a given industry. (Lab. Code, § 1178.) It must then select a wage board composed equally of employer and employee representatives and designate a nonvoting chairperson. The wage board reports a recommendation (Lab. Code, § 1178.5, subds. (a), (b)), and after the IWC receives that report, it prepares proposed regulations. In most cases, the IWC must hold a public hearing in three cities in the state. (Lab. Code, § 1178.5, subd. (c).) The IWC must give notice of these public hearings by advertising in newspapers throughout the state and mailing notice "to each association of employers or employees which, in the opinion of the commission, would be affected by the hearing." (Lab. Code, § 1181, subds. (a), (b).) The IWC must also publish any action that it takes in newspapers throughout the state (Lab. Code, § 1182.1) and mail copies of new regulations to affected employers (Lab. Code, § 1183). Any aggrieved person may apply within 20 days for a rehearing. (Lab. Code, § 1188.) Finally, the public has a right to petition the IWC to adopt new regulations. (Lab. Code, §§ 1176.1, 1176.3.)

In light of these comprehensive procedural protections applicable to IWC rulemaking, the Legislature no doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance. Thus, the Legislature provided that IWC regulations promulgated in accordance with the Labor Code are "valid and operative" and expressly exempted from the APA. (Lab. Code, § 1185.)

The DLSE's primary function is enforcement, not rulemaking. (Lab. Code, §§ 61, 95, 98-98.7, 1193.5.) Nevertheless, recognizing that enforcement requires some interpretation and that these interpretations should be uniform and available to the public, the Legislature empowered the DLSE to promulgate necessary "regulations and rules of practice and procedure." (Lab. Code, § 98.8.) The Labor Code does not, however, include special rulemaking procedures for the DLSE similar to those that govern IWC rulemaking, nor does it expressly exempt the DLSE from the APA. At issue in this litigation is whether the Legislature intended to make the DLSE's regulations subject to the APA, and if it did, whether the DLSE policy at issue here constitutes a regulation.

The APA provides that "[*n*]*o state agency* shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation . . . , unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Gov. Code, § 11340.5, subd. (a), italics added.) The APA applies "to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted," and the APA's provisions "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

(Gov. Code, § 11346, italics added.) These broad statements of scope suggest the APA applies to the DLSE.

Defendants argue that applying the APA to the DLSE's interpretations of IWC wage orders would undermine the IWC's exemption from the APA. For example, the DLSE argues: "Clearly, in deliberately excluding the wage order promulgation process from the procedures and oversight of the APA, the Legislature could not have intended the very wage orders it had specifically excluded from the APA to be rescreened and examined under the APA when interpreted." Of course, the wage order is not "rescreened and examined under the APA"; rather, the DLSE's policy interpreting the wage order is so examined. Moreover, the Legislature created comprehensive rulemaking procedures that apply to the IWC in lieu of the APA. No such procedures apply to the DLSE.

The APA provides that "[*n*]*o state agency* shall issue, utilize, enforce, or attempt to enforce . . . a regulation" without complying with the APA's notice and comment provisions. (Gov. Code, § 11340.5, subd. (a), italics added.) The exception that covers the IWC is expressly limited to the IWC and makes specific reference to the comprehensive rulemaking procedures that apply to the IWC. (Lab. Code, § 1185.) In the absence of textual support or some other persuasive indication of legislative intent, we will not assume the Legislature intended the DLSE to adopt regulations without any public participation or procedural safeguards. Thus, we find no basis for exempting the DLSE from the requirements of the APA.

Defendants argue the DLSE policy at issue here is not a regulation subject to the APA. The APA, however, defines "regulation" very broadly to include "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency." (Gov. Code, § 11342, subd. (g).) A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497 [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.) Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (Gov. Code, § 11342, subd. (g).)

Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. (*Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal.3d 465, 471; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 309-310; *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345; *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28 (*Aguilar*).) Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. (Gov. Code, §§ 11343, subd. (a)(3), 11346.1, subd. (a).) Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations. (Cf. Lab. Code, § 1198.4 [implying that some "enforcement policy statements or interpretations" are not subject to the notice provisions of the APA].) A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing

agency proceedings than are the decisions and advice letters that it summarizes.

Examples of policies that courts have held to be regulations subject to the rulemaking procedures of the APA include: (1) an informational "bulletin" defining terms of art and establishing a rebuttable presumption (*Union of American Physicians & Dentists v. Kizer, supra*, 223 Cal.App.3d at p. 501); (2) a "policy of choosing the most closely related classification" for determining prevailing wages for unclassified workers (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 128); and (3) a policy memorandum declaring that work performed outside one's job classification does not count toward qualifying for a promotion (*Ligon, supra*, 123 Cal.App.3d at p. 588). In contrast, examples of policies that courts have held not to be regulations include: (1) a Department of Justice checklist that officers use when administering an intoxilyzer test (*People v. French* (1978) 77 Cal.App.3d 511, 519); (2) the determination whether in a particular case an employer must pay employees whom it requires to be on its premises and on call, but whom it permits to sleep (*Aguilar, supra*, 234 Cal.App.3d at pp. 25-28); (3) a contractual pooling procedure whereby construction tax revenues are allocated among a county and its cities in the same ratio as sales tax revenues (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 375); and (4) resolutions approving construction of the Richmond-San Rafael Bridge and authorizing issuance of bonds (*Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324).

The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces by determining the scope of the IWC wage orders. Finally, the record does not establish that the policy was, either in form or substance, merely a restatement or summary of how the

DLSE had applied the IWC wage orders in the past. Accordingly, the DLSE's enforcement policy appears to be a regulation within the meaning of Government Code section 11342, subdivision (g), and therefore void because the DLSE failed to follow APA procedures.

Defendants cite *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 978-979 (*Bono Enterprises*), and *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 252-253 (Skyline Homes), in support of their assertion that the DLSE's enforcement policy is not a regulation. In *Skyline Homes*, the court considered the propriety of an employer's method of calculating overtime pay for salaried employees who worked a fluctuating workweek. The employer calculated an employee's hourly wage by dividing the employee's weekly salary by the number of hours the employee actually worked in a particular week. Thus, if an employee with a weekly salary of $500 worked 50 hours in a particular week, the employer calculated a base hourly wage of $10 and paid an additional $5 per hour for every hour of overtime. The DLSE, on the other hand, had a written policy of calculating an employee's hourly wage by dividing the employee's weekly salary by 40 hours (regardless of how many hours the employee actually worked) and not applying any of the base salary to overtime. Thus, if we use the same example as above, the DLSE would calculate an hourly wage of $12.50 ($500 ÷ 40 hours) and require an additional $18.75 per hour for every hour of overtime.

The employer in *Skyline Homes* asserted that the DLSE's policy for calculating overtime was a regulation within the meaning of the APA and therefore void because the DLSE did not adopt it in accordance with the APA. The Court of Appeal disagreed, reasoning that the policy was merely an interpretation precedent to enforcement. (*Skyline Homes*, *supra*, 165 Cal.App.3d at p. 253.) The only case the Court of Appeal cited in support of its holding was *Bendix Forest Products Corp. v. Division of*

Occupational Saf. & Health, supra, 25 Cal.3d 465, which involved the interpretation of a regulation in the context of a specific adjudication, not a blanket interpretation that the agency memorialized in a policy manual, intending to apply it in all cases of a particular class or kind.

The policy for calculating overtime pay at issue in *Skyline Homes* was a regulation within the meaning of the APA because it was a standard of general application interpreting the law the DLSE enforced and because it was not merely a restatement of prior agency decisions or advice letters. We acknowledge that the employer challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy of general application and thus a regulation. We disapprove *Skyline Homes* to the extent that it concludes otherwise.

In *Bono Enterprises*, the employer challenged a DLSE policy that required the employer to pay its employees if they had to remain on its premises during lunch break. The DLSE's policy interpreted an IWC wage order that required employers to pay for " 'the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.' [Citation.]" (*Bono Enterprises, supra,* 32 Cal.App.4th at p. 971.) The employer asserted, among other things, that the DLSE's policy was a regulation within the meaning of the APA and therefore void because the DLSE had not adopted it in accordance with the APA. (*Id.* at p. 978.)

The Court of Appeal disagreed, describing the policy as an interpretation of a regulation, not a new regulation, and citing *Skyline Homes*, *supra*, 165 Cal.App.3d 239. (*Bono Enterprises*, *supra*, 32 Cal.App.4th at p. 978.) The court noted that the DLSE had to have discretion to interpret the IWC regulation in particular factual contexts. (*Ibid.*) The court added that it would not declare generally invalid a policy that appeared reasonable "on its face";

instead, the court would "assume decisions are fairly made on a case-by-case basis." (*Id.* at p. 979.)

The court in *Bono Enterprises* seems not to have appreciated the thrust of the employer's argument. The issue was not the DLSE's power to interpret the IWC regulation on a case-by-case basis or the reasonableness of its interpretation. The issue was the DLSE's power to interpret the regulation in an enforcement policy of general application without following the APA. Because the DLSE's policy interpreted the wage order, applied generally to a class of similar cases, and did not merely restate or summarize the DLSE's prior decisions or advice letters, it was a regulation within the meaning of the APA. We disapprove *Bono Enterprises* to the extent that it concludes otherwise.

Defendants also argue that the DLSE's interpretation of the IWC wage orders "is the only reasonable interpretation," and therefore it does not constitute a regulation, but rather a direct application of the law. (See *Liquid Chemical Corp. v. Department of Health Services* (1991) 227 Cal.App.3d 1682, 1696, 1698; cf. *Union of American Physicians & Dentists v. Kizer*, *supra*, 223 Cal.App.3d at p. 498.) We disagree. Indeed, if the DLSE's interpretation of the IWC wage orders were the only reasonable interpretation, then the DLSE would not need to state the interpretation in a policy manual in order to "achieve some measure of uniformity from one office to the next."

Professor Michael Asimow, as an amicus curiae, suggests that interpretive regulations, such as the DLSE policy at issue here, are consistent with the APA because full APA rulemaking requirements apply only "to the exercise of any *quasi-legislative* power." (Gov. Code, § 11346, italics added.) Professor Asimow argues interpretive regulations are not "quasi-legislative" because an agency does not adopt them pursuant to delegated legislative power, and they do not have the force of law. (See generally,

Asimow, *California Underground Regulations* (1992) 44 Admin.L.Rev. 43.)

We disagree. A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. Professor Asimow argues that interpretive regulations are nonlegislative because, though courts should give them "deference," "[c]ourts need not follow them; [and] members of the public may choose to follow them but are not legally bound to do so." (See *International Business Machines v. State Bd. of Equalization*, *supra*, 26 Cal.3d at p. 931, fn. 7 [discussing scope of review of interpretive regulations].) To the extent, however, courts must defer to agency interpretations found in these regulations, they are rules of law, and the public disregards them at its peril.

Moreover, even if we were to agree with Professor Asimow that the Legislature did not consider interpretive regulations to be "quasi-legislative," an agency would arguably still have to adopt these regulations in accordance with the rulemaking procedures of the APA. Government Code section 11346 states that APA rulemaking procedures apply "to the exercise of any quasi-legislative power"; however, the statute does not state the opposite, i.e., that the rulemaking procedures do *not* apply when an agency adopts rules that are *not* quasi-legislative. On the other hand, Government Code section 11340.5 makes clear that the rulemaking procedures of the APA apply to any "regulation," and the definition of regulation includes "every rule . . . adopted . . . to . . . *interpret* . . . the law . . ." (i.e., interpretive regulations). (Gov. Code, § 11342, subd. (g), italics added.) If the Legislature did not intend the APA to apply to interpretive regulations, we do not think it would have expressly included interpretive regulations in this definition. Furthermore, when the Legislature wanted to create exceptions to the formal rulemaking requirements of the

APA, it did so expressly and in separate sections. (Gov. Code, §§ 11346.1, subd. (a), 11343, subds. (a), (b); see also Gov. Code, § 11351; Lab. Code, § 1185.)

Professor Asimow asserts that full APA compliance entails impractical costs and delays. The agency must devote significant resources to building an agency file that will satisfy the Office of Administrative Law. (Gov. Code, § 11347.3, subd. (b).) Among other things, the agency must establish the necessity of the proposed rule. (Gov. Code, §§ 11349.1.) In addition, opponents of a proposed rule may file long and complex comments, which the agency must address point by point. (Gov. Code, §§ 11346.8, subd. (a), 11346.9.) Professor Asimow argues that, because of the burden of full APA compliance, agencies do not adopt regulations. Instead, they resort to case-by-case adjudication, and they use informal oral communications to direct agency staff. Sometimes, agencies seek statutory amendments, in lieu of adopting regulations, or they simply ignore the APA, issuing and enforcing regulations without regard to its provisions.

Professor Asimow identifies serious concerns. Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarify ambiguities in the law and ensure agency-wide uniformity. In addition, agencies cannot always respond to changing circumstances promptly if they must ask the Legislature for a statutory amendment or resort to a regulatory process fraught with delays. Finally, if an agency simply ignores the APA, it ceases to be responsive to the public, and its regulations are vulnerable to attack in the courts.

Of course, the ability of agencies to issue restatements or summaries of their prior decisions and prior advice letters

mitigates these concerns to some extent. If an issue is important, then presumably it will come before the agency either in an adjudication or in a request for advice. By publicizing a summary of its decisions and advice letters, the agency can provide some guidance to the public, as well as agency staff, without the necessity of following APA rulemaking procedures. If in some circumstances agencies should also be free to adopt regulations informally and without following the APA's elaborate procedures, then the Legislature should state what those circumstances are and what lesser procedural protections are appropriate. Until it does, we decline to carve out an exception for interpretive regulations that we do not believe the language of the APA adequately supports.

Thus, we conclude that DLSE's policy for determining whether to apply IWC wage orders to maritime employees constitutes a regulation and is void for failure to comply with the APA. Defendants assert that, even if the DLSE policy is void, the interpretation the DLSE expressed in that policy is nevertheless entitled to deference because of its more than 80 years of experience. We addressed and rejected the same argument in *Armistead, supra*, 22 Cal.3d at page 204. "[T]o give weight to [an improperly adopted regulation] in a controversy that pits [the agency] against an individual member of exactly that class the APA sought to protect . . . would permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither." (*Ibid.*) We conclude we can give no weight to the DLSE's interpretation of the wage orders. (See also *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 107; *City of Los Angeles v. Los Olivos Mobile Home Park* (1989) 213 Cal.App.3d 1427, 1433.)

Nevertheless, while we do not defer to the DLSE's interpretation of the IWC wage orders, we do not necessarily reject its decision to apply the wage orders to maritime employees working in the Santa Barbara Channel. If, when we agreed with an agency's

application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. Here, for example, if Tidewater and Zapata violate applicable IWC wage orders, they should not be immune from suit simply because the DLSE adopted an invalid policy. The DLSE's policy may be void, but the underlying wage orders are *not* void. Courts must enforce those wage orders just as they would if the DLSE had never adopted its policy. Thus, in *Armistead*, although we determined not to give weight to an agency interpretation, we nevertheless considered whether that interpretation was correct. (*Armistead*, *supra*, 22 Cal.3d at pp. 205-206.) We disapprove *Grier v. Kizer* (1990) 219 Cal.App.3d 422 to the extent that it holds otherwise.

In conclusion, we hold that the DLSE's interpretation of the IWC wage orders is void and not entitled to any deference. Nevertheless, the question remains whether the wage orders apply to Tidewater's and Zapata's activities in the Santa Barbara Channel.

C. Wage Orders Nos. 4-89 and 9-90 Apply to Tidewater's and Zapata's Activities in the Santa Barbara Channel

By their terms, wage orders Nos. 4-89 and 9-90 might apply to maritime employment anywhere in the world. Plaintiffs, however, argue that California's territorial boundaries establish the limits of the IWC's and the DLSE's jurisdiction, citing Labor Code sections 1173, 1174, and 1193.5. Labor Code section 1173 imposes on the IWC the duty to ascertain information about wages, hours, and working conditions "in this state"; section 1174 facilitates this information-gathering process by imposing certain affirmative duties on "[e]very person employing labor *in this state*"; and section 1193.5 authorizes DLSE representatives to

"[i]nvestigate and ascertain the wages of all employees, and the hours and working conditions of all employees employed in any occupation *in the state*." (Italics added.) Nothing, however, in these sections explicitly defines or limits the IWC's or the DLSE's jurisdiction.

In some circumstances, state employment law explicitly governs employment outside the state's territorial boundaries. (Lab. Code, §§ 3600.5, 5305 [California workers' compensation law applies to workers hired in California but injured out of state].) The Legislature may have similarly intended extraterritorial enforcement of IWC wage orders in limited circumstances, such as when California residents working for a California employer travel temporarily outside the state during the course of the normal workday but return to California at the end of the day. On the other hand, the Legislature may not have intended IWC wage orders to govern out-of-state businesses employing nonresidents, though the nonresident employees enter California temporarily during the course of the workday. Thus, we are not prepared, without more thorough briefing of the issues, to hold that IWC wage orders apply to *all* employment in California, and *never* to employment outside California.

Nevertheless, California's territorial boundaries are relevant to determining whether IWC wage orders apply. The Labor Code provides that "[o]ne of the functions of the Department of Industrial Relations [which includes the IWC and the DLSE] is to foster, promote, and develop the welfare of the *wage earners of California* . . . ." (Lab. Code, § 50.5, italics added.) If an employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a "wage earner of California" and presumptively enjoys the protection of IWC regulations. (Cf. *United Air Lines, Inc. v. Industrial Welfare Com.* (1963) 211 Cal.App.2d 729, 735, 748–749 [court assumes that IWC regulations apply to persons who are domiciled in California but work principally outside the

state].) Thus, because the crew members who work for Tidewater and Zapata in the Santa Barbara Channel reside in California and receive pay in California, we must determine whether their work in the Santa Barbara Channel is also in California.

Plaintiffs argue that the federal law definition of California's boundaries applies and therefore that Tidewater's and Zapata's operations in the Santa Barbara Channel are outside the state. As discussed above, the federal law definition of California's boundaries applies "when the extent of a state's territorial jurisdiction is relevant to the operation of federal law." (*Weeren, supra*, 26 Cal.3d at p. 660.) On the other hand, where state and federal law do not conflict, "the state boundaries as defined by our state Constitution and statutes . . . are the limits to which the Legislature implicitly intended to extend California's . . . laws . . . ." (*Id.* at p. 669.) Because the sole issue is the interpretation and application of IWC wage orders, which constitute state law, and because we find no conflict with federal law, we hold that California's *state law* boundaries apply, which boundaries encompass the Santa Barbara Channel.

Accordingly, the crew members who work for Tidewater and Zapata in the Santa Barbara Channel reside in California, receive pay in California, and work in California. They are "wage earners of California" and presumptively enjoy the protections of IWC wage orders. Because we find nothing in the wage orders or the Labor Code to rebut that presumption, we hold that the wage orders apply to these employees, and the trial court erred by enjoining their application. We express no opinion as to whether the trial court can enjoin the application of IWC wage orders to crew members who work primarily outside California's state law boundaries because the Court of Appeal did not address that question.

III. DISPOSITION

We affirm the judgment of the Court of Appeal.

CHIN, J.

WE CONCUR:

GEORGE, C.J.
MOSK, J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
BROWN, J.

Filed August 1, 1995

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TIDEWATER MARINE WESTERN, INC., ZAPATA GULF PACIFIC, INC. and OFFSHORE MARINE SERVICE ASSOCIATION, Plaintiffs and Respondents, v. LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA, and ALVIN ALLEN, et. al., Defendants and Appellants.	2d Civil No. B082689 (Super. Ct. No. 195103) (Santa Barbara County)

The Labor Commissioner of the State of California (Labor Commissioner), the Industrial Welfare Commission (IWC), and the Division of Labor Standards Enforcement (DLSE) appeal from a judgment granting respondents Tidewater Marine Western, Inc. (Tidewater), Zapata Gulf Pacific, Inc. (Zapata) and Offshore Marine Service Association a permanent injunction and peremptory writ of mandate. The judgment prohibits appellants from ". . . applying the statutes, Wage Orders, regulations, manuals and other provisions of California law pertaining to

maximum hours of work and overtime pay to any of [respondents'] employees who work beyond the State of California's territorial borders located three nautical miles off the coast." In addition, the trial court stayed actions filed by many present and former employees of Tidewater and Zapata to recover unpaid overtime compensation. The Labor Commissioner, DLSE, IWC and 31 employees appeal from the judgment.

We hold that the Labor Commissioner, the IWC, and the DLSE are empowered to regulate overtime compensation of California residents who work on vessels operating exclusively to and from a California port or ports if they enter into employment contracts in California. This covers the oil boat workers who work principally in the Santa Barbara Channel. We further hold that IWC has exercised its jurisdiction over employees so engaged by promulgating wage order 9-90, and that the DLSE enforcement policy properly extends that wage order to the employees in this action. (Cal. Code Regs., tit. 8, § 11090.) Accordingly, we reverse.

FACTS

Tidewater and Zapata operate fleets of seagoing vessels which transport workers and supplies between the California mainland and oil drilling platforms lying within the Santa Barbara Channel from one to twelve nautical miles off shore. Tidewater also operates an oceanographic research vessel which travels up to 50 nautical miles off the coast and is engaged in voyages that may last several months.[1] Respondent, Offshore Marine Service

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[1] The record contains little information concerning this vessel. It is not referred to in the pleadings, motions for summary judgment or statements of undisputed material facts. In fact, respondents' pleadings refer exclusively to crew members of supply, crew, and towing vessels which "regularly travel up to 25 nautical miles off the California coast[,]" a description which appears to exclude employees working on the oceanographic research vessel. We conclude,

Association, is a trade association which represents owners and operators of vessels engaged in similar services.

All of respondents' vessels depart from and return to ports within the State of California. The vessels are equipped with sleeping quarters and kitchens for use by crew members. Crew members work on a schedule of seven or fourteen days on and seven days off, with duty periods of twelve hours within each twenty-four hour period. While on board, crew members are on call 24 hours a day. Consistent with the standard among maritime employers, crew members are paid a flat daily rate of pay without overtime compensation. Current rates range from slightly less than $100.00 to over $200.00 per day. The crew members at issue here are California residents who begin and end their work periods in this state. They are paid in California and pay California income taxes.

The Federal Fair Labor Standards Act specifically exempts these employees from federal overtime regulations. (29 U.S.C. § 213, subd. (b) (6), 29 C.F.R. §§ 783.29, et seq.) Maximum hours of work and working conditions on the vessels are, however, regulated by the Federal Shipping Act and regulations issued by the United States Coast Guard. (46 U.S.C. §§ 8101, 8104; 31 C.F.R. §§ 157, et seq.) Neither the Federal Shipping Act nor the

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therefore, that respondents' pleadings have not placed in issue the status of employees working on that vessel. Thus, neither the judgment nor this opinion addresses the extent to which California may regulate the maximum hours of work or overtime compensation due such employees.

To the extent that the judgment purported to adjudicate the status of employees on the oceanographic research vessel, it would be reversed because numerous issues of material fact remain unresolved. For example, the record does not disclose the locations where this vessel operates nor does it contain any information concerning the job duties of employees on this vessel. It is therefore impossible to determine whether these employees are employed in the transportation industry within the meaning of wage order 9-90. (Cal. Code Regs., tit. 8, § 11090, subd. (2)(C).)

coast guard regulations require or preclude payment of overtime compensation.

In 1988, Tidewater and other maritime employers filed an action in the United States District Court for the Central District of California challenging attempts by DLSE to apply state overtime regulations to crew members on vessels operating in the Santa Barbara Channel. Tidewater contended that federal maritime law preempted the California regulations. Although this argument was successful in the district court, the Ninth Circuit Court of Appeals reversed, holding that federal maritime law did not preempt California regulation of the wages, hours and working conditions of such employees. (*Pacific Merchant Shipping Ass'n. v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1416; cert. denied, 112 S.Ct. 2956 (1992).)[2] Respondents then filed this action seeking a ruling that state overtime compensation regulations did not apply to the crew members on respondents' vessels.

The California Constitution, Statutes, Orders, and Policies

California Constitution, article XIV, section 1 provides: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." The IWC and its parent agency, the Department of Industrial Relations, are charged with the responsibility ". . . to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (Lab. Code, § 50.5.) To that end, the IWC issues wage orders which regulate ". . . the hours and

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[2] Zapata was not a party to the federal action. Here it reprises Tidewater's argument that the California regulations are preempted by federal law. The Ninth Circuit has exhaustively and correctly analyzed these issues. We decline the invitation to revisit them.

conditions of labor and employment in the various occupations, . . . in which employees are employed in this state . . . ." (Lab. Code, §§ 1173, 1178.5.) The Legislature has declared that "[i]t is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions . . . ." (Lab. Code, § 90.5, subd. (a).)[3]

IWC wage order 9-90 sets the minimum wage and maximum work hours for "all persons employed in the transportation industry." (Cal. Code Regs., tit. 8, § 11090, subd. (1).)[4] The "transportation industry" includes "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air or water . . . ." (Cal. Code Regs., tit. 8, § 11080, subd. (2)(c).) Among other things, the wage order specifies the circumstances under which employees in the transportation industry are entitled to receive overtime compensation. (Cal. Code Regs., tit. 8, § 11080, subd. (3).)

IWC wage orders and other minimum labor standards are enforced by DLSE. (Lab. Code, § 82.) In section 10.65 of its "Operations and Procedures Manual," DLSE has declared: "IWC

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[3] It is beyond question that these statutes are remedial legislation. "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702; see also *Ford Dealers Assn. v. D.M.V.* (1982) 32 Cal.3d 347, 356.) Here the trial court strictly construed the Labor Code to defeat application of wage order 9-90 to respondents' employees. As we shall explain, this strict construction was erroneous. (See *infra*, at p. 11 et seq.)

[4] Wage order 9-90 supersedes wage order 9-80, which was in effect when respondents initiated their action in federal court. For all purposes relevant to this appeal, the two orders are identical.

standards apply to crews of fishing boats, cruise boats, and similar vessels operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of California. Employees in the commercial fishing industry are not covered by the IWC regulations . . . ." This policy has never been published in the California Code of Regulations and was not adopted pursuant to the Administrative Procedures Act. (Gov. Code, §§ 11340, et seq.)

The Trial Court Ruling

The trial court credited respondents' contention and ruled that the Labor Code, wage order 9-90 and DLSE policy do not apply outside the territorial boundaries of California as established by federal law. In so ruling, the trial court said that the Labor Code ". . . does not expressly include a declaration of legislative intent that the IWC's rulemaking extend to workers who depart from California, perform their daily work in the territory of another sovereign (the United States), and then return to California to bank their pay and engage in off-duty pursuits. . . . [E]ither the Legislature never considered the problem, or . . . the Legislature intended these acts to have no extraterritorial operation." Even if the Labor Code allowed IWC to regulate "extraterritorial" employment, the trial court ruled that IWC had never exercised its jurisdiction because its wage order does not explicitly refer to "offshore workers whose job sites are outside" the state, and because the IWC never "specifically announced its intent to regulate these sorts of offshore enterprises . . . ."

Appellant's Contention

Appellants argue that the Legislature's intent to regulate the working conditions of respondents' maritime employees may be inferred from the history and purpose of the Labor Code, if not from its express terms. They contend that DLSE was not

obligated to follow the Administrative Procedure Act in promulgating its internal policy because the policy is an interpretation of wage order 9-90 rather than a new regulation. Appellants also challenge the scope of the judgment, arguing that it inappropriately restricts the ability of DLSE and IWC to regulate the hours and working conditions of employees who spend even a small fraction of their work hours outside the territorial boundaries of California.

Standard of Review

In ruling on an appeal from the grant of a summary judgment, we apply the same analytical process as the trial court. "First, we identify the issues framed by the pleadings . . . . [¶] Secondly, we determine whether the moving party's showing has established facts which . . . justify a judgment in movant's favor. . . . [¶] [T]he third and final step is to determine whether the opposition demonstrates the existence of a triable, material fact issue. [Citations.]" (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.)

Because an appeal from a summary judgment motion raises only questions of law, we must independently analyze the supporting and opposing papers to determine whether there is a triable issue as to any material fact. (Code Civ.Proc., § 437c, subd.(c); *Planned Parenthood v. City of Santa Maria* (1993) 16 Cal.App.4th 685, 690.) We view the evidence before the trial court in the light most favorable to the non-moving parties. (*Gibb v. Stetson* (1988) 199 Cal.App.3d 1008, 1011; *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, 627.)

The Reach of California Law

The territorial boundaries of California as established by federal law differ from those established by state law. As a matter of federal law, California's ". . . territorial claims in Santa Barbara

Channel are confined to three-mile belts seaward from the mainland and around the perimeter of each of the islands in the channel." (*People v. Weeren* (1980) 26 Cal.3d 654, 662; see also *United States v. California* (1965) 381 U.S. 139, 172-75 [14 L.Ed.2d 296, 316-18, 85 S.Ct. 1401].)

The California Constitution and Government Code, however, provide that the state's territorial boundary runs "three English nautical miles oceanward of lines drawn along the outer sides of the outermost of the islands, . . . along and adjacent to the mainland and across intervening waters . . . ." (Gov. Code § 170.) In addition, the territory of the state extends throughout its inland waters, which include, "[a]ll waters between the mainland and the outermost of the islands . . . ." (Gov. Code, § 171.)

In *People v. Weeren, supra*, 26 Cal.3d 654, our Supreme Court held that, ". . . when the extent of a state's territorial jurisdiction is relevant to the operation of federal law, the [federal] delineation of state boundaries prevails over conflicting state assertions." (*Id.* at p. 660.) The *Weeren* court also said, "[f]airly read, *California II* established the state's 'boundaries' for *all* purposes, political and proprietary, 'as between Nation and State.'" (*Id.*, at p. 663.) However, where the interests of the federal and state governments do not conflict, and the state has a legitimate interest at stake, the state may give effect to its laws for the benefit of workers on federally defined waters. This is especially appropriate where state law has defined such waters as being within the state territorial boundaries. (See *Weeren* at pp. 669-670.)

In *Weeren* a California resident was subject to criminal prosecution for using fishing methods prohibited by state law, even though the fishing occurred beyond the three mile federal limit but within the boundary as defined by state law. (*Id.* at pp. 659, 669.) The Supreme Court ruled that California had a

legitimate interest in regulating fishing activity along its coast and that the relevant state and federal regulations did not conflict. (*Id.* at pp. 666-667.) Thus, ". . . the state boundaries as defined by our state Constitution and statutes . . . are the limits to which the Legislature implicitly intended to extend California's criminal laws, including Fish and Game Code section 2000." (*Id.* at p. 669-670.) Accordingly, the Fish and Game Code applied to conduct occurring within the Santa Barbara Channel, despite the fact that the statute contained no express reference to "extraterritorial" jurisdiction over fishing methods.

The same reasoning applies here. If the state can regulate the taking of fish in the Santa Barbara Channel, it can surely regulate labor of its own residents who work there. The employees at issue in this case spend all of their working hours within the Santa Barbara Channel. The Ninth Circuit Court of Appeals has already determined that there is no conflict between federal and state regulation of overtime compensation for these workers. (*Pacific Merchant Shipping Ass'n v. Aubry*, *supra*, 918 F.2d 1409, 1427.) Accordingly, there is no reason to limit the application of California law to the boundaries established by the federal government and there is a reason to hold that the remedial legislation designed to protect California residents follows them on the Santa Barbara Channel provided they are otherwise described in wage order 9-90.

In *North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, the Supreme Court held that it is possible for California to apply its statutes outside the state, but the state's intention to do so "will not be declared to exist unless [it] is clearly expressed or reasonably to be inferred 'from the language of the act or from its purpose, subject matter or history.'" *Id.* at p. 4, quoting *Kennerson v. Thames Towboat Co.* 89 Conn. 367 [L.R.A. 1916A, 436, 94 Atl. 372].)

North Alaska held that California's original workers' compensation statute did not apply to injuries suffered by a California resident while working in Alaska for a California employer. First, the statute did not expressly "indicate that the compensation provisions were intended to apply to injuries occurring in foreign jurisdictions . . . . Nothing is said about the place of injury." (*North Alaska Salmon Co. v. Pillsbury*, *supra*, 174 Cal. at p. 4.) Second, because the statute declared itself to be the exclusive remedy for workplace injuries, its application would necessarily have prevented Alaska from applying its own law to an injury occurring within its borders. The court refused to assume ". . . that the legislature of this state undertook to pass a law which would trench upon the sovereign powers of any other jurisdiction." (*Id.* at p. 5.) Finally, while the case was pending, the legislature amended the statute to add a section which expressly provided coverage for certain employees injured while working outside the state. The Supreme Court considered this ". . . more or less significant as indicating that the law-making body itself did not consider the original statute as covering extraterritorial injuries." (*Id.*)

Here, as in *North Alaska*, California's wage and hour statutes do not expressly state that IWC wage orders apply to California employees who cross the federal boundary during the workday. However, there is within the Labor Code a clearly expressed intention to protect the interests of such employees. The IWC and DLSE are charged with the obligation to ". . . foster, promote, and develop the welfare of the wage earners of California . . . ." (Lab. Code, § 50.5.) As indicated (see *ante*, fn. 3) legislative enactments regulating work hours and overtime compensation are remedial in nature, and must be liberally construed for the protection and benefit of the employee. The employees at issue here reside, are paid wages, and pay income taxes in California. They are, therefore "wage earners of California" entitled to the protection of California laws regulating their hours of work and overtime compensation.

The remaining factors which restricted application of the workers' compensation statute in *North Alaska* are not present here. Applying California law to these workers would not infringe on the sovereignty of any other nation or state. There is no conflict between federal and California law in this area, and no other state claims jurisdiction over the Santa Barbara Channel. (*Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1427.)

In addition, the subsequent conduct of the Legislature demonstrates its belief that the IWC and DLSE have jurisdiction over these employees. IWC Wage Order 9-80, the predecessor to the current wage order, took effect in January 1980. In 1986, the Legislature enacted Labor Code section 1182.3, exempting licensed commercial fishers and employees of commercial passenger fishing boats from IWC wage and hour regulations. Employees of commercial fishing and passenger fishing vessels, like the employees at issue here, frequently cross the federal boundary in the Pacific Ocean. The fact that the Legislature found it necessary to exempt those employees from IWC regulation is a strong indication that the Legislature believes it has granted IWC the power to regulate other employees who perform work beyond the federal boundary in the Pacific Ocean.

The IWC Has Exercised Its Jurisdiction Over Respondents' Maritime Employees by Enacting Wage Order 9.90

The trial court concluded that the IWC had not exercised jurisdiction over respondents' maritime workers because its wage orders ". . . do not contain a clear and distinct statement that they are intended to be applied to workers who reside in California but leave its boundaries to reach their jobs." According to the trial court: "The impact of these rules on offshore commercial enterprises is sufficiently great that due process requires that before these rules be given extraterritorial effect, that intent must be publicly declared and submitted to the regular process of

publication and comment which attends all valid administrative rulemaking." We disagree.

Due process does not require that the IWC specifically identify every conceivable job title or category of employer subject to an industry-wide wage order. At most, the wage order must ". . . give the person of ordinary intelligence a reasonable opportunity to know" which employers and employees are covered by the order. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763 [221 Cal.Rptr. 799, 710 P.2d 845]. See also *Rutherford v. State* (1987) 188 Cal.App.3d 1267, 1276.)

Wage order 9-90 applies to "all persons employed" in ". . . any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another . . . by . . . water . . . ." (Cal. Code Regs. tit. 8, § 11090, subd. (1), (2)(c).) Respondents concede their employees fit this definition. Nevertheless, respondents claim they had no idea that wage order 9-90 would apply to their employees because the wage order does not explicitly refer to workers who spend a portion of their workday outside the state. The argument is disingenuous at best. These workers convey persons and property over the water from the mainland to oil drilling platforms. Persons of ordinary intelligence are capable of discerning that these employees are engaged in the transportation industry and, therefore, subject to the terms of wage order 9-90. IWC's exercise of jurisdiction over these employees did not violate due process.

DLSE's Internal Policy is a Valid Administrative Interpretation of IWC Wage Order 9-90.

The DLSE internal policy at issue here provides that wage order 9-90 applies to ". . . crews of fishing boats, cruise boats, and similar vessels operating exclusively between California ports, or returning to the same port, if the employees in question entered into employment contracts in California and are residents of

California." Relying upon cases such as *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, respondents contend, and the trial court determined, that this policy constitutes "underground rulemaking" and violates the Administrative Procedures Act because it expands the scope of wage order 9-90 to cover workers not specifically considered by the IWC during its public rulemaking. (Gov. Code, § 11340 et seq.)

The IWC must comply with the rulemaking procedures outlined in the Labor Code before it may adopt, amend or rescind a wage order. (Lab. Code, § 1178.5.) Absent compliance with those procedures, any wage order or other regulation adopted by the IWC or DLSE is void. (Gov. Code, § 11347.5.)

A regulation is "a rule of general application which implements, interprets and makes specific the statute . . . ." (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 128; see also Gov. Code, § 1342, subd. (b).) DLSE internal policies which interpret or construe the words of a wage order and apply the order to a specific situation are not regulations within the meaning of the Administrative Procedures Act. (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 27.)

Here, the DLSE policy interpreted IWC wage order 9-90 to include California residents employed in the transport of goods or persons by water, including the "crews of fishing boats, cruise boats and similar vessels . . . ." This interpretation is consistent with the language and intention of the wage order. Rather than establishing a new rule of general application throughout the industry, the DSLE policy interprets the term "transportation industry" and applies the wage order to a specific group of employers. The DSLE policy is not, therefore, a regulation subject to the Administrative Procedures Act. (*Id.* at p. 27; *Skyline Homes Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 253.)

Conclusion

The trial court erred in restricting the scope of the Labor Code and wage order 9-90, in concluding that IWC had not adequately identified respondents' employees as persons subject to the wage order, and in concluding that DLSE had incorrectly interpreted the wage order with respect to those employees. This decision protects California employees, is consonant with article XIV, section 2, of the California Constitution, and implements the purpose of the remedial statutes passed by the Legislature.

The judgment is reversed. Costs to appellants.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

STONE, P. J.

GILBERT, J.

Filed January 18, 1994

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA BARBARA

TIDEWATER MARINE WESTERN, INC.; ZAPATA GULF PACIFIC, INC.; and OFFSHORE MARINE SERVICE ASSOCIATION, Plaintiffs, v. LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, et al., Defendants.	No. 195103 RULINGS ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT
METSON MARINE, INC. and SAN PEDRO OFFSHORE MARINE, INC., Plaintiff Intervenors.	

The plaintiffs and intervenors in this case have moved for summary judgment, contending that undisputed facts establish, among other things, that the State of California has not adopted a statute, or engaged in valid administrative rulemaking under the state Administrative Procedure Act, which would extend the state's wage and hours laws to operate outside the state's territory in the near-offshore waters. In the alternative, they contend that the

state's attempt to regulate wages, hours, and working conditions for offshore workers who spend some of their time outside the three-mile limit is pre-empted by implication by the exclusive federal jurisdiction in maritime matters. These motions were fully briefed and argued, and have been submitted to the court for decision on Friday January 7, 1994. For the reasons stated in this memorandum of decision, the court has determined to grant the motions.

Federal Pre-emption

The argument that the exclusive federal jurisdiction reserved by the United States Constitution to the federal government in maritime matters operates by implication to pre-empt California from attempting to regulate these offshore workers was examined, and decisively rejected by the United States Court of Appeals for the Ninth Circuit. (*Pacific Merchant Shipping v. Aubrey* (9th Cir. 1990) 918 F.2d 1409, 1415-1416.) This court is aware that decisions of the intermediate federal appellate courts are persuasive, but not binding, authority for California state trial courts. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456-457.) Nevertheless, this court declines the invitation extended by the moving parties to get into conflict with the ruling of the Ninth Circuit. This court will presume, for the purpose of the present case, that California is not ousted of jurisdiction over the wages, hours, and working conditions of the offshore workers by the operation of federal pre-emption. We turn to the question whether the state has validly exercised the jurisdiction it possesses.

Boundaries of the State

The seaward boundaries of the state are defined in California Constitution, Article 3, section 2, as explained and made more definite by Government Code section 170. There it states that the seaward boundaries of the state of California are a line three

English nautical miles offshore, from a line connecting the outermost headlands of all bays and estuaries, and from a line connecting the outermost works of all artificial harbors. Measured by that definition, many of the workers in this case perform their duties outside the territory of the state of California, although it should be noted that under Government Code section 170 the ocean within three English nautical miles of the shores of all the islands, such as the Channel Islands, which the federal government recognizes as being territory of California, is included within the territorial waters of the state. Many, though not all, of the oil extraction platforms where these workers perform their duties are located in the area of the Santa Barbara Channel which is within the twelve-mile limits which define the waters of the United States, but not within the three-mile limits described above for the territorial waters of California. (*In re Marincovich* (1920) 48 Cal.App. 474.) The limit of the state's territory is the ordinary limit of the state's regulatory jurisdiction. (*Oil Worker's International Union v. Superior Court* (1951) 103 Cal.App.2d 512.) The three-mile limit is the boundary between state and federal jurisdiction for most purposes. (See *People v. Weeren* (1980) 26 Cal.3d 654.)

Extraterritorial Regulation By California

The state Supreme Court has held that under certain circumstances, the state may exercise extraterritorial effects by statute or regulation, provided that the intention to have a rule operate outside the state's boundaries clearly appears on the face of the enactment. (*North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1. The necessary legislative intent for extraterritorial operation may be gathered from the face of the statute (*North Alaska Salmon, supra,* 174 Cal. at 5) or from reading several related statutes together (*People v. Weeren, supra,* 26 Cal.3d 654.)

The state cites Labor Code section 50.5, which provides authority for the Industrial Welfare Commission (IWC) to regulate wages, hours and working conditions *in this state*. The statute does not expressly include a declaration of legislative intent that the IWC's rulemaking extend to workers who depart from California, perform their daily work in the territory of another sovereign (the United States), and then return to California to bank their pay and engage in off-duty pursuits. Labor Code section 50.5, which does not expressly empower the IWC to make rules having extraterritorial operation, must be read in conjunction with Government Code section 110: "The sovereignty and jurisdiction of this state extends to all places *within its boundaries* as established by the constitution." (Emphasis added.) Neither standing alone, nor in conjunction with the positive language of Government Code section 110, does the conclusion appear to follow that the Legislature intended these statutes, or the orders of the IWC, to have extraterritorial effect. To the contrary, it appears either that the Legislature never considered the problem, or that the Legislature intended these acts to have no extraterritorial operation.

Likewise, the rulings of the IWC itself do not contain a clear and distinct statement that they are intended to be applied to workers who reside in California but leave its boundaries to reach their jobs. Assuming for the sake of argument that the Labor Code empowers the IWC to regulate the working conditions of offshore workers whose job sites are outside the three-mile limits, this court concludes that the IWC has not invoked that power. The state does not refer the court to any hearing or administrative proceeding in which the IWC specifically announced its intent to regulate these sorts of offshore enterprises, and the court is directed to no public notice or hearings in which such an intention was submitted to public comment. The court concludes that the IWC either did not intend such effect for its rulings, or did not comply with the state APA if such an intent was secretly

entertained. The impact of these rules on offshore commercial enterprises is sufficiently great that due process requires that before these rules be given extraterritorial effect, that intent must be publicly declared and submitted to the regular process of publication and comment which attends all valid administrative rulemaking. That apparently was not done in this case, and it is fatal to the state's position.

The state observes that hearings before the IWC on the "transportation industry wage order" were held in 1989, well after the commencement of the *Pacific Marine* case in federal district court. The state points out that at those hearings, none of the marine companies concerned with these issues appeared or commented. From this, the state appears to argue that the companies are somehow not permitted to make the present objections. The flaw in the state's position is that in the IWC hearings of 1989, the state points to no unambiguous public notice that the state was proposing to openly and directly declare extraterritorial application for the Transportation Industry Wage Order. In the absence of such public notice, the companies might well have concluded that the IWC hearings had nothing to do with any issue in which they had any interest.

The state seeks to avoid this point by the argument that if the Labor Code, the state Constitution, and the IWC wage orders themselves do not declare an intent to operate with extraterritorial effect, the Enforcement Manual of the DLSE does declare such an intent. The state offers several uncontroversial propositions as foundations for this argument. First, the state observes that the opinions and interpretations of the administrative agency charged with enforcement of a particular body of administrative regulations are entitled to considerable weight in the judicial interpretation of the regulations. Second, the state observes that several years ago, the DLSE amended its enforcement manual, which is essentially its standing instructions and policies to guide its field agents, to

declare that henceforth enforcement would be had as to offshore employees. From these points, the state argues that the manual is the equivalent of a rule or statute, and should be given such weight as to resolve this issue in the state's favor.

However, a portion of the state's own argument is fatally inconsistent with the effect the state would wish to give the manual of the DLSE. The state points out that the manual in question did not have to be adopted by proceedings conforming to the state administrative procedure act, because the manual is not a "regulation" having the force of law. (See Gov. Code section 11342(b), which requires compliance with the notice and hearing process for every "regulation", including "every rule ... adopted by any state agency to ... interpret ... the law enforced ... by it.") The state is thus caught in a dilemma: if the DLSE policy manual is a policy statement intended to interpret the scope of the Labor Code by granting extraterritorial enforcement to the wage orders of the IWC, then the manual would indeed constitute a "regulation" which would be invalid unless it went through the notice, hearing and publication procedures before adoption *and subsequent publication in the California Code of Regulations*. But the state admits that this was never done with this manual, and maintains that it was not required to be done, because the manual is only intended as an internal working document and policy guide for the information of the DLSE enforcement officers. That being so, the manual does not have, and cannot have, the force of law; specifically, it cannot add to the Labor Code or the IWC wage orders any intent for extraterritorial application which is not already found in the words thereof. Since the Labor Code and the IWC wage orders do not declare that they have extraterritorial effect, it follows that they have none. Since the manual was not adopted by proceedings conforming to the APA, it follows that the manual adds nothing to the Code and regulations.

Conclusion

The state Constitution and Government Code section 170, taken together, establish the seaward boundary of this state's jurisdiction at three English nautical miles offshore. While statutes may, in certain limited circumstances, be given effect to regulate conduct which occurs outside the state's boundaries, one of the indispensable preconditions for such extraterritorial effect is that such intent must appear clearly on the face of the enactment. The state Labor Code does not so declare, and neither do the IWC wage orders at issue in this case. While the Ninth Circuit has determined that California may regulate offshore workers, in the absence of conflicting Congressional enactments, California has not yet validly exercised this power. Therefore, California's attempts at such regulation premised only on the authority of the DLSE Enforcement Manual must fail, because the manual is not the functional equivalent of a statute or regulation, was not adopted by proceedings conforming to the state APA, and thus does not have the force of law. Accordingly, the motions for summary judgment against the state are granted on these grounds.

The moving parties are directed to submit appropriate forms of judgment.

IT IS SO ORDERED.

Dated: January 18, 1994.

/s/
WILLIAM L. GORDON, JUDGE

Nos. 91-142 and 91-349

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

TIDEWATER MARINE SERVICE, INC., ET AL., PETITIONERS
v.
LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER, ET AL.

PACIFIC MERCHANT SHIPPING ASS'N, ET AL., PETITIONERS
v.
LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act preempts the application of California's overtime compensation laws to certain maritime workers.

2. Whether the application of California's overtime compensation laws to those workers is preempted by the federal law of admiralty, as defined in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and its progeny.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case involves the intersection of admiralty law, state minimum wage laws, and the Fair Labor Standards Act (FLSA). Under Section 7(a) of the FLSA, 29 U.S.C. 207(a), overtime must generally be paid at one-and-a-half times the regular rate to

employees who work more than 40 hours in a given week. Overtime need not be paid, however, to "seamen." Department of Labor regulations define "seamen" as employees who "work primarily as an aid in the operation of [a] vessel as a means of transportation" (29 C.F.R. 783.33) and "perform[] no substantial amount of work of a different character." 29 C.F.R. 783.31. Other maritime employees who work on vessels fall within the broader admiralty definition of "seamen," see *McDermott Int'l Inc. v. Wilander*, 111 S. Ct. 807, 817 (1991), but are not exempt from the overtime compensation requirements of the FLSA.[1]

The FLSA does not completely displace state wage and hour laws. The statute includes a savings clause, 29 U.S.C. 218(a), that preserves state laws that provide greater protection to workers. That clause provides, in pertinent part, that "[n]o provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum work week lower than the maximum workweek established under [the FLSA]." 29 U.S.C. 218(a).

2. This controversy arises out of California's effort to enforce its state overtime compensation requirements with respect to a very narrow class of maritime workers who are all California residents serving on vessels that are not engaged in foreign,

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[1] The lower courts referred to those employees who fall within the FLSA's definition of seamen as "seamen" and to other employees who satisfy the traditional admiralty definition as "maritime employees." Pet. App. A3, A47-A48. We use the same terminology in this brief, but also use the term "maritime workers" to refer to both categories of employees collectively. (Our citations to "Pet. App." refer to the appendix to the petition in No. 91-142.)

intercoastal, or coastwise voyages.[2] All of the employees affected work on vessels that do not travel to ports outside of California.

a. Clean Seas, a petitioner in No. 91-349, operates two vessels, *Mr. Clean II* and *Mr. Clean III*, which control and clean up oil spills and other environmentally hazardous discharges off the California coast. *Mr. Clean II* is moored at Port San Luis Harbor in California, approximately 90% of the time. Mr. Clean III conducts containment and clean-up operations four to ten nautical miles off the California coast, and at other times is tied to a buoy approximately seven miles off the California coast.[3] Pet. App. A5. Employees on *Mr. Clean III* are organized into rotating crews that serve seven days on duty followed by seven days off. While on duty, crewmembers work 12-hour shifts, alternating with 12-hour rest periods.[4] *Id.* at A5–A6 & n.3.

b. The petitioners in No. 91-142, Tidewater Marine Service and Western Boat Operators (collectively Tidewater), operate two vessels that transport cargo and passengers between California ports and off-shore oil platforms. Their crews, like those of Clean Seas, work alternating seven-day periods and 12-hour shifts. Pet. App. A6–A7.

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[2] As defined by federal statute, "foreign" voyages are voyages between a port in the United States and a port in a foreign country other than Mexico, Canada, or the West Indies (46 U.S.C. 10301(a)(1)); "coastal" voyages are voyages between ports on the Atlantic and Pacific Oceans (46 U.S. C. 10301 (a)(2)); and "coastwise" voyages are voyages between a port in one State and a port in another State (except an adjoining State) (46 U.S.C. 10501).

[3] California's territorial waters extend to a line three miles off the State's coast. The high seas lie beyond that line.

[4] The record does not indicate how the employees of *Mr. Clean II* are organized.

c. In 1987, twelve Clean Seas employees filed claims for unpaid overtime compensation with respondent Aubry, the Labor Commissioner of California. Aubry is responsible for enforcing Wage Orders issued by the California Industrial Welfare Commission. Aubry found that the Clean Seas employees were entitled to overtime pay under IWC Wage Order 4-80. The order covers "professional, technical, clerical, mechanical and similar occupations." Pet. App. A7. There does not appear to be any dispute that the order had not previously been applied to maritime workers. The Labor Commissioner nevertheless concluded that the order was applicable, and awarded each employee an average of $45,000 in overtime compensation. *Ibid.*

3. Several trade associations that represent employers in the maritime and oil and gas industries (hereinafter collectively Pacific Merchant)[5] then commenced this action in the United States District Court for the Central District of California, seeking declaratory and injunctive relief against further enforcement of California's overtime pay laws. The complaint alleged, among other things, that those laws are preempted by the FLSA, 29 U.S.C. 201 *et seq.*, and by federal admiralty law. Tidewater intervened in the action after one of its employees filed a claim for $50,000 in unpaid overtime compensation with respondent. Pet. App. A8.

The district court held that the FLSA preempts California's overtime laws as applied to the employees in question. Pet. App. A65.[6] The court reasoned that the FLSA is "a comprehensive,

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[5] Those trade associations, Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association, and Western Oil & Gas Association are petitioners, along with Clean Seas, in No. 91-349.

[6] Portions of the district court's opinion suggest that it may have considered application of state law to employees serving on vessels engaged in coastwise voyages. The court of appeals, however, did not address such

uniform and national system of wage and hour regulation" that "provides maritime employers and employees with a uniform legal standard by which to ascertain their legal rights and obligations." *Id.* at A61. The court added that "common sense suggests that the uniformity of federal admiralty law would be destroyed if the states were permitted to 'add on' to the federal law enacted by Congress." *Id.* at A62.

4. A divided court of appeals reversed. Pet. App. A1-A44. The court declined to resolve issues of state law raised by the parties, but held that application of the California wage and hour laws in issue was not preempted by the FLSA or by federal admiralty law.[7]

a. Petitioners urged the court of appeals to find that Aubry had failed "to comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement." Pet. App. A32. The court declined to resolve these issues, emphasizing that "we are *not* deciding here whether Aubry's actions are valid *as a matter of California administrative and labor law.* Our task is to determine only whether, in this case, federal law preempts California's overtime pay provisions." *Ibid.* The court concluded that petitioners' "challenges to Aubry's action on state law grounds must be directed to the state's agencies and courts." *Ibid.*[8]

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employees. Pet. App. A9-A10 & n.5. See also *id.* at A66 n.7 (reserving the question whether maritime employees employed primarily in territorial waters would be subject to state law).

[7] The United States filed an amicus brief in support of respondents in the Ninth Circuit.

[8] The court also found that it was not required to abstain from considering petitioners' claim for declaratory and injunctive relief against the state proceedings. Pet. App. A33 n.22. Although the court observed that in some circumstances "comity requires that federal courts abstain from considering

b. With respect to the issue of federal preemption, the court found the "general rule on preemption in admiralty" to be "that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." Pet. App. A26. It held that respondent's actions satisfied both requirements under the very narrow circumstances of this case.

With respect to the first prong of this test, the court found that "[m]aritime statutes do not apply to maritime employees, like these, who are not on vessels making foreign, intercoastal, or coastwise voyages"; that the FLSA savings clause, 29 U.S.C. 218(a), "specifically allow[s] states to enforce overtime laws more generous than the FLSA";[9] and that there is "no indication that Congress intended that maritime employees not benefit from more generous state wage and hour laws." Pet. App. A27. Thus, the court concluded, "California's attempt to supplement federal law in this case does not present an irreconcilable conflict with the statutory maritime law or with the FLSA; it does not 'contravene the essential purpose expressed by an act of Congress.'" *Ibid.*

The court also concluded that application of California's overtime pay laws "does not unduly disrupt federal admiralty law and, for that reason, is not constitutionally invalid." Pet. App. A35. Balancing "federal and state interests involved in application

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actions for declaratory and injunctive relief against state proceedings," it concluded that deciding the federal issue would not unduly interfere with those proceedings. *Ibid.*

[9] The court of appeals rejected the district court's characterization of the savings clause as an impermissible delegation of authority to prescribe maritime law. Rather, the panel stated, the savings clause simply makes clear Congress's "intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards." Pet. App. A25.

of the overtime provisions," the court determined "that the balance tips in favor of California in this case." *Id.* at A31-A32. The court determined that "application of the state's overtime law will not disrupt international or interstate commerce" because the vessels in question operate exclusively off the California coast and their crews consist of California residents. *Id.* at A34.

Judge Copple dissented. He would have held "that state laws mandating overtime pay are preempted by federal admiralty law" and by the FLSA. Pet. App. A42.

DISCUSSION

This case presents difficult and novel issues concerning a State's exercise of its traditional powers to regulate the minimum wages of its citizens in the context of maritime employment. Under this Court's cases, the decisive question—under the particular circumstances presented here—is whether the State's assertion of authority impermissibly interferes with the "proper harmony and uniformity" or the "characteristic features" of general maritime law. On the specific facts of this case, we believe that the court of appeals correctly concluded that the State's assertion of authority was not unconstitutional. Furthermore, although this Court may ultimately need to resolve the issues presented, we do not believe that review is necessary at this time. Rather, it would be appropriate to defer judgment on the constitutional question resolved by the court of appeals at least until potentially dispositive state law issues have been addressed by the California state courts.

1. The permissible scope of the States' role in regulating maritime activity has been a recurring issue in this Court. The general principles applicable to this case are, accordingly, well established.

a. Article III extends the judicial power to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2,

Cl. 1. This jurisdictional grant empowers "the federal courts in their exercise of the admiralty and maritime jurisdiction * * * to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' and to continue the development of this law within constitutional limits" and also empowers "Congress to revise and supplement the maritime law within the limits of the Constitution." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959).

It is also firmly established, however, that States retain authority to act on a variety of issues within the scope of federal admiralty jurisdiction. As this Court explained in *Romero*, 358 U.S. at 373-374: "It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope." Consequently, maritime law has often been "modified or supplemented by state action." *Just v. Chambers*, 312 U.S. 383, 388 (1941).[10]

b. In defining the role that state law may properly play in the maritime context, this Court has made clear that state law may be preempted in either of two ways:

First, a federal statute has the same preemptive effect in the maritime setting as in any other context. Thus, under this Court's familiar formulation, the federal statute may expressly preempt state law; it may occupy the field to the exclusion of state law; and state laws that are inconsistent with the federal statute or that stand as an obstacle to Congress's objectives are invalid. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

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[10] See, *e.g.*, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

Second, in the seminal case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court recognized a further limitation on state authority in the maritime context. In *Jensen*, a New York dockworker was killed in the course of moving cargo from a vessel engaged in the interstate shipment of goods. His survivors thereafter sought compensation under the New York Workers' Compensation Act. This Court held that the state statute could not be applied to the accident. While recognizing that "general maritime law may be changed, modified, or affected by state legislation * * * to some extent," the Court declared (244 U.S. at 216):

> [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

As *Jensen* made clear, that limitation on state authority is comparable to the one derived from the so-called "dormant Commerce Clause."[11]

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[11] The Court explained in *Jensen* (244 U.S. at 216-217):

> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation * * * between the States, Congress can alone act upon it and provide the needed regulations." * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. at 443 (noting that state statute may be unconstitutional if "unduly burdensome on maritime activities or interstate commerce"). See also *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (the Commerce Clause itself "is 'a limitation upon

c. As the Court's subsequent decisions in the area of workers' compensation reflect, the so-called "*Jensen* line"—between matters governed exclusively by uniform federal maritime law and matters on which States may act—is difficult to discern.[12] The Court has cautioned against reading *Jensen* too broadly,[13] but it has not retreated from the core principle articulated in that case--that state law may not interfere with the "characteristic features of the general maritime law" or "the proper harmony and uniformity of that law in its international and interstate relations." See, *e.g.*, *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 306 & n.14 (1983); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-719 (1980); *Askew v. American Waterways Operators, Inc.*, 411 U.S. at 337-339, 344; *Just v. Chambers*, 312 U.S. at 389.[14]

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state power even without congressional implementation'" and "requires that some aspects of trade generally must remain free from interference by the States").

[12] Although *Jensen* could have been read to preclude application of state workers' compensation statutes to any injuries on navigable waters, this Court later held that state law would govern accidents occurring on such waters that were "local matters." *Grant SmithPorter Ship Co. v. Rohde*, 257 U.S. 469, 477 (1922). After a period in which the Court had difficulty in clarifying the scope of that exception to *Jensen*, it then recognized a "twilight zone" in which an injured maritime employee could invoke either state workers' compensation statutes or the federal Longshore and Harbor Workers' Compensation Act. See *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 256 (1942); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

[13] See *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 (1943); *Askew v. American Waterways Operators, Inc.*, 411 U.S. at 344.

[14] Cases applying that general principle to specific situations are legion. See 1 S. Friedell, *Benedict on Admiralty* §§ 112-113 (rev. 7th ed. 1992) (collecting cases in which state law has and has not been preempted).

Various forms of state regulation have been upheld under this test. As this Court noted in *Askew*: "State-created liens[,] * * * [s]tate remedies for wrongful death and state statutes providing for the survival of actions[,] * * * [s]tate rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." 411 U.S. at 338, quoting *Romero*, 358 U.S. at 373-374.

The import of these decisions is that every attempt by the States to regulate maritime activity must be carefully examined on its own facts. We therefore turn to the question of whether application of state overtime compensation laws to the vessels in issue is foreclosed either because: (1) a federal statute, here the FLSA, preempts state law; or (2) the application of California's laws to the circumstances of this case unduly interferes with maritime uniformity under *Jensen*.

2. The court of appeals' basic conclusion—that the FLSA does not preempt California's overtime statute—is required by the statutory language itself. That conclusion is also fully consistent with this Court's precedents.[15]

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[15] In the courts below, petitioner Tidewater also relied on 46 U.S.C. 8104, a provision of the Shipping Act which regulates the maximum number of hours that seamen may work aboard certain United States-documented vessels. 91-142 Pet. 6, 26, 29. Both the district court (Pet. App. A59-A60) and court of appeals (*id.* at A12-Al4) concluded that this provision does not preempt state laws requiring overtime pay for those working fewer hours. Neither petition seeks further review of that determination. Similarly, issues concerning federal regulation of the minimum manning requirements to certain commercial vessels are not at issue. State regulation of this issue would present a very different question from the one presented here.

a. The literal language of the FLSA's savings clause, 29 U.S.C. 218(a), forecloses petitioners' claim of statutory preemption. That Section states that "[n]o provision" of the FLSA—a reference broad enough to encompass both the exemption for "seamen" and the Act's overtime provisions as applied to other maritime employees—shall excuse noncompliance with "any * * * State law" establishing higher minimum wages or more generous overtime protection. Congress scarcely could have expressed its intention to preserve state law more clearly. Cf. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 310 (1943) (rejecting the contention that an exemption from federal Social Security taxes for persons employed "as an officer or member of the crew of a vessel on the navigable waters of the United States" preempted state unemployment insurance taxes).[16]

b. This Court's decisions in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Oil Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407 (1976); and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), do not suggest a different conclusion. In *Knickerbocker Ice*, the Court struck down a federal statute that purported to authorize application of state workers' compensation laws beyond the "*Jensen* line"—i.e., to the area in which this Court had already held that application of state law would interfere unduly with the uniformity of federal maritime

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[16] Federal and state courts have uniformly construed 29 U.S.C. 218(a) to preserve state laws from claims that they are preempted by FLSA exemptions. *Overnight Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir.), cert. denied, 112 S. Ct. 170 (1991); *Pony Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986); *Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45, 46-47 (1st Cir. 1981); *Central Delivery Serv. v. Burch*, 355 F. Supp. 954, 958 (D. Md. 1973), aff'd mem., 486 F.2d 1399 (4th Cir. 1973); *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972); *Skyline Homes, Inc. v. Department of Indus. Relations*, 211 Cal. Rptr. 792, 799 (Ct. App. 1985); *Webster v. Bechtel, Inc.*, 621 P.2d 890, 896-900 (Alaska 1980); *Plouffe v. Farm & Ranch Equipment Co.*, 570 P.2d 1106, 1109 (Mont. 1977); *State v. Comfort Cab Co.*, 286 A.2d 742, 746-748 (N.J. Super. Ct. App. Div. 1972).

law. The savings clause in the FLSA is not subject to challenge on the same basis. It protects state laws from claims that they have been preempted by the FLSA; it does not purport to add to the authority States possess to enact maritime law or to protect such laws from *Jensen*-type preemption.

Although somewhat closer to the mark, *Mobil Oil* and *Tallentire* are also distinguishable. In *Mobil Oil*, the Court addressed a provision of the National Labor Relations Act that preserves certain state right-to-work laws. Section 8(a)(3) of that Act, 29 U.S.C. 158(a)(3), generally authorizes agency and union shop agreements, but a savings clause provides that "[n]othing in th[e] [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment *in any State or Territory in which such execution or application is prohibited by State or Territorial Law*," 29 U.S.C. 164(b) (emphasis added). In keeping with the highlighted phrase, this Court determined that the savings clause preserved state law only within certain territorial limits. Specifically, the Court held that "predominant job situs is the controlling factor in determining whether * * * a State can apply its right-to-work laws to a given employment relationship" and, accordingly, that no State could apply its right-to-work laws to employees who spent most of their time working on the high seas. 426 U.S. at 420.[17] There is no language in the FLSA's

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[17] In reaching that conclusion, the Court relied on several factors: (1) the fact that the savings clause, like the provision authorizing agency shop agreements, focuses on "*post*-hiring conditions of employment," which by their nature center on the job situs (426 U.S. at 417); (2) legislative history indicating that the validity of agency shop agreements was to be determined "under the laws of any State in which they are to be performed," presumably the job situs (*id.* at 418); and (3)two "practical considerations"—the propriety of "minimiz[ing] the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws" (*ibid.*) and promoting predictability regarding the legality of agency shop agreements (*id.* at 419). None of those factors was tied to the maritime character of the employment at issue.

savings clause that places any comparable territorial limit on the state law it preserves. To the contrary, the FLSA provision protects "any * * * State law" providing minimum wages or overtime above the floor set by the FLSA, thereby preserving those laws to the fullest extent permissible.

Tallentire construed Section 7 of the Death On the High Seas Act (DOHSA), 46 U.S.C. 767, as a "jurisdictional savings clause" preserving the jurisdiction of the state courts over actions under that statute, as opposed to "a guarantee of the applicability of state substantive law to wrongful deaths on the high seas." 477 U.S. at 232. The Court chose from among those two alternatives on the basis of a detailed review of the drafting history of that Section in light of the maritime law prevailing at the time of its enactment. *Id.* at 220-233. In the course of this analysis, the Court found support for its choice in the "prevailing 'uniformity' doctrine" recognized by *Jensen*. See *id.* at 227. The Court did not suggest that a savings clause must invariably be construed to preclude application of state law in the maritime setting, and the FLSA's savings clause cannot be construed in a manner analogous to Section 7. Consequently, *Tallentire* does not support petitioners' position.

3. Because the FLSA neither adds to nor detracts from the authority States otherwise possess to apply their overtime laws to

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In fact, the majority in *Mobil Oil* declined to adopt Justice Powell's suggestion, which parallels petitioners' position here, that the employees' status as seamen should be decisive. See 426 U.S. at 421 (Powell, Jr., concurring in the judgment) (urging that the NLRA savings clause should not apply to "employment contracts of maritime workers whose job situs is the high seas and who thereby enjoy a special status"). The Court also made clear that it was "creat[ing] no 'exemption' from § 14(b) for the maritime industry." *Id.* at 420 n.12.

Far from supporting petitioners' position, therefore, *Mobil Oil* indicates that a savings clause that is capable of applying in both the land-based and maritime settings should have the same basic effect in both contexts.

maritime workers, the issue of *Jensen* interference must be addressed. As set forth above, *Jensen* requires preemption if application of California's statute to the workers at issue here "works material prejudice to the characteristic features of the general maritime law" or "interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216; *Just v. Chambers*, 312 U.S. at 388 n.7, 389. The *Jensen* test is defined at such a high level of generality, however, that it provides very little guidance for determining when a State has exceeded its constitutional authority to regulate conduct. We are nevertheless persuaded—based on the precedents that have applied *Jensen*—that the court of appeals correctly concluded that the State's assertion of authority was constitutional on the specific facts of this case.

a. The Ninth Circuit's resolution of the *Jensen* issue derives strong support from several considerations. First, it is not clear that application of the State's overtime compensation rules to vessels that do not engage in interstate or foreign commerce disrupts the "uniformity" of maritime law "in its international and interstate relations." *Jensen*, 244 U.S. at 216. *Jensen* itself involved application of state law to the owner of a vessel engaged in *interstate* transportation of goods. The court of appeals' holding in this case is in fact limited to vessels whose significant contacts are all exclusively with California—i.e., to vessels that "do not engage in foreign, intercoastal, or coastwise voyages." Pet. App. A9-A10 n.5. See also *id.* at A30-A37 (same).[18]

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[18] The court expressly reserved the question whether respondent is "preempted by federal law from applying California's overtime pay laws to maritime employees employed primarily on the high seas on *coastwise* vessels engaged in *coastwise* voyages." Pet. App. A9-A10 n.5. It should be noted that some interstate and foreign voyages fall outside the definitions of "coastwise," "coastal," and "foreign" voyages—for instance, voyages between adjoining States, or between a State and Canada or Mexico. See note 2, *supra*. The court of appeals' reasoning, however, suggests that its holding would not reach vessels engaged in any interstate or foreign voyages. See *id.* at A34 (noting that

Further, the employment relationship has strong ties to California. The employees at issue are all California residents who were hired in California, receive paychecks at California addresses, and pay California taxes. *Id.* at A7, A32, A34–A35, A37.

We recognize that the vessels in issue are not engaged in wholly "intrastate" activities because their operations are conducted at least in part on the high seas off the California coast. It seems to be more germane to this prong of the *Jensen* inquiry, however, that the vessels are not travelling to other state and foreign ports, where concerns of "uniformity" and conflicting legal requirements are more likely to come into play. Cf. *Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1991) (declining to adopt a rule of maritime law governing wrongful death actions that would distinguish between territorial waters and the high seas).

Second, it is not apparent that a uniform rule governing overtime pay is the kind of "characteristic feature[] of the general maritime law" (*Jensen*, 244 U.S. at 216) that precludes state law supplementation. As the cases cited by petitioners indicate (91-349 Pet. 11–12), admiralty courts have generally enforced the parties' bargain with respect to overtime, regardless of whether that bargain precluded or required overtime pay. Although petitioners emphasize that 12-hour shifts are standard in the industry, California does not prohibit that practice.

Finally, as the court of appeals correctly observed, States have a keen interest in protecting the welfare of their citizens through the adoption of overtime compensation laws. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the States' constitutional authority to impose minimum wage requirements as an exercise of the police power). A State may refrain from regulating employment in the maritime industry for a variety of

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application of State's law would not disrupt "international or interstate commerce").

compelling reasons, but its underlying interest in protecting the wages of its citizens who, work on board vessels is no different than its interest in protecting its citizens who work in factories.

b. That being said, there is, we believe, considerable force to petitioners' arguments that state law should not apply to their operations. The interest in the uniformity of maritime law has retained the greatest force with respect to "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." *Askew v. American Waterways Operators, Inc.*, 411 U.S. at 344. In terms of their effect on vessels and their crews, overtime compensation laws are in many respects similar to the workers' compensation law at issue in *Jensen* itself, and the state statute of frauds that this Court held could not bar a seaman from recovering damages under an oral contract with a vessel owner in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

This Court has nevertheless permitted some state regulation of the relationship between the vessel and its crew. In *Standard Dredging Co. v. Murphy*, 319 U.S. 306 (1943), the Court found that application of a state unemployment insurance statute to vessels employing seamen off the coast of New York was not "destructive of admiralty uniformity." *Id.* at 309. The Court found that *Jensen* invalidated a State's efforts to provide workers' compensation remedies because they "interfered with the existing admiralty system of relief," *ibid.*, but that no similar argument could be made with respect to, the imposition of taxes on vessels to provide unemployment compensation for workers. Similarly, *Kossick* can be read to mean only that the state law of contracts should not be invoked to directly prohibit a method of contracting—the use of oral agreements—that had been widely used in maritime commerce.

In contrast, California's overtime compensation requirement simply imposes a financial burden on the vessel owner as a nondiscriminatory exercise of the State's police power in

furtherance of the public welfare of its citizens. See, *Kossick*, 365 U.S. at 741 (emphasizing that the statute of frauds was a rule of contract law, not a "public regulation"). Requiring overtime compensation, as in Murphy, does not directly interfere with any rule of admiralty law or prohibit any method of contracting or navigating."[19]

We also recognize that application of state overtime statutes on the high seas is more likely to lead to the possibility for conflicts among state laws. See *Tallentire*, 477 U.S. at 213-214 (describing the consequences of efforts to apply state wrongful death statutes in that setting). When a State seeks to assert jurisdiction over a vessel based upon such factors as the residence of the members of the crew or contacts between the vessel and a State (rather than the vessel's exclusive presence in its territorial waters), the potential that more than one State will be in a position to assert such an interest is not difficult to envision. Although the court of appeals identified facts in this case that made such conflicts unlikely, the mobility of vessels, their potential for multiple uses, and the turnover in their crews may make those limitations hard to enforce in later cases. For these reasons, there is considerable force to the point that application of state overtime laws *could* lead to undue interference with the essential uniformity of federal maritime law.

4. States have seldom sought to regulate activities on the high seas and, to our knowledge, have never sought to regulate the overtime compensation of seamen and maritime employees. Although it is difficult to resolve the constitutionality of such state regulation under the imprecise standard adopted in *Jensen*, we do not believe that review of respondent's action is necessary at this time. In our view, several factors counsel in favor of deferring consideration of this question.

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[19] A state law imposing a maximum number of hours per shift would, in our view, pose a greater potential for direct interference.

First, the state courts have not yet had an opportunity to consider petitioners' claims that the wage order in issue cannot properly be applied to maritime workers under state labor and administrative law. It does not appear that these claims are frivolous. As petitioners point out, the express terms of the wage order appear to be directed at "land-based" occupations, 91-142 Pet. 7; 91-349 Pet. 9; the order has never previously been applied to maritime workers, *ibid.*; the wage order was adopted by a separate agency, the Industrial Welfare Commission, after public rulemaking, 91-42 Pet. 7 n.9; and respondent's extension of the order to maritime workers was made without any period for notice and comment.[20] Petitioners have accordingly asserted that respondent failed to "comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement," Pet. App. A32; yet these claims have not been resolved because petitioners' challenges to the state administrative proceedings have been stayed pending the outcome of this case. Br. in Opp. 7.

This is not to suggest that in applying these regulations to petitioners' operations respondent exceeded his administrative authority. We suggest, more modestly, that the Court may wish to decline to consider whether respondent's actions were unconstitutional until after the state courts have had an opportunity to determine whether they were proper under state law. If the state courts conclude that respondent exceeded his authority under state labor or administrative law, then the constitutional issue will obviously be rendered moot.

Second, we are persuaded that the decision's potential for immediate disruption of maritime commerce is not sufficient to

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[20] Even the California Labor Commissioner has expressed uncertainty as to the category of maritime workers he will seek to protect under the law. Br. in Opp. 8, 12-14 (questioning whether, in light of the court of appeals' limitations on relief, petitioners' "anticipated problems" with the ruling will ever arrive).

outweigh these countervailing prudential considerations. There is apparently no dispute that the issue is "novel," and that no other State has sought to apply its overtime compensation laws to maritime workers. Pet. App. A46; 91-142 Pet. 5 n.3. The vessel owners therefore cannot presently claim that they are being subjected to conflicting state law requirements. The Ninth Circuit in fact minimized the potential for such conflict by expressly limiting its decision to application of California's overtime rule to vessels that do not make interstate or foreign voyages.

Third, and relatedly, the Ninth Circuit is the first court of appeals to consider the issue presented. As a result, there is no disharmony, as yet, in the body of federal law. In addition, the analysis required by *Jensen* depends heavily on the nature of the burdens the state requirement imposes on maritime commerce. Consideration of the question might therefore be more informed after a greater opportunity for the courts to evaluate the practical impact of the specific regulatory efforts in issue. All in all, further review can appropriately wait for another day.[21]

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[21] Principles of issue preclusion and stare decisis will limit the ability of some parties to relitigate this constitutional question in California. It would not appear likely, however, that further consideration of the issue will be totally foreclosed in future proceedings. Parties with proper standing who were not represented in this case could raise the constitutional question in state court proceedings. A judgment of the California court on the constitutional issue would then be subject to review on certiorari. Further, the issue would also be subject to review again in federal proceedings if respondent seeks to enforce the overtime laws to other vessels that present materially different facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1992

DECLARATION OF

CAPTAIN ROBERT A. JANECEK, USCG (RET.)

Captain Robert A. Janecek declares:

1. I am a retired Captain of the United States Coast Guard, and I currently work as an independent marine consultant, surveyor and safety inspector. I served in the Coast Guard more than 30 years, during which I had broad experience in all facets of the Coast Guard's work. I retired from the Coast Guard on June 30, 1988, with an Honorable Discharge. I was recalled to active duty during the summer of 1988 to supervise the Coast Guard's involvement in the America's Cup, completing that assignment at the end of September 1988.

2. My work in the Coast Guard generally included vessel inspections; port and environmental safety and management; marine casualty and personal injury investigations; enforcement of Coast Guard regulations; vessel operations; and drafting maritime policies, procedures and regulations.

3. During my final active duty assignment in the Coast Guard, I served from June 1986 through June 1988 as the Officer in Charge of the Los Angeles/Long Beach Zone. That Zone extends from Dana Point in the south to Point Conception in the north, including the Santa Barbara Channel. As Officer in Charge, I managed over 250 employees involved in diversified operations, including all Coast Guard vessel inspections in our Zone.

4. As part of all United States vessel inspections, the Coast Guard issues a document entitled "Certificate of Inspection," which lists certain information about the vessel and the conditions under which it may be operated. When I was Officer in Charge of the Los Angeles/Long Beach Zone, all Certificates of Inspection were issued under my direction and approval. Although some

Certificates of Inspection may bear the name of a Coast Guard officer other than myself, I had overall responsibility for their issuance and another name appears only because I was absent on the date in question.

5. The Certificates of Inspection issued under my direction and approval included certificates for the supply and crew vessels used in servicing the offshore platforms in the Santa Barbara Channel. This included the supply and crew vessels operated in the Santa Barbara Channel by Tidewater Marine Western, Inc., formerly known as Western Boat Operators, Inc. ("Tidewater Western") and Zapata Gulf Pacific, Inc. ("Zapata Pacific").

6. By way of example, the Coast Guard Certificate of Inspection issued for the Tidewater Western vessel *Smith Tide* was issued under my direction and approval. The Certificate of Inspection for *Smith Tide* is attached to this declaration as Exhibit A. The Certificates of Inspection for Zapata Pacific's vessels, which were also engaged in offshore transportation to and from the oil platforms, were very similar.

7. In issuing Certificates of Inspection for vessels, the Coast Guard examines a variety of factors that are specified by the federal maritime laws and regulations of the United States. These include the vessel manning requirements, total passengers, geographic area of operation, specified conditions of operation, and necessary safety equipment. In examining these factors, the Coast Guard is concerned about the safety and welfare of the vessel, its crew and its passengers, based upon standard government regulations and the unique specifications and working conditions of the vessel in question.

8. By way of example, the Certificate of Inspection for *Smith* Tide reveals a crew vessel that is 65 feet in length and 75 gross tons. The certificate specifies the number of operators and crew

required for the vessel under its various operating conditions, including ocean and coastwise routes.

9. In issuing these Certificates of Inspection, the Coast Guard and other federal maritime authorities regulate the working conditions and hours of work on offshore crew and supply vessels such as those operated by Tidewater Western and Zapata Pacific in the Santa Barbara Channel. I say that for several reasons.

10. In the first place, the whole idea of vessel inspections and Certificates of Inspection by the Coast Guard is to specify the overall safe operating conditions of each vessel. That necessarily includes the welfare and working conditions of the crew, as a vessel cannot be operated safely if the crew is overworked or overextended. That is why Coast Guard Certificates of Inspection specify the manning requirements for each vessel under its various operating conditions.

11. In addition, there are federal maritime laws that specifically govern working hours and conditions of work on these kinds of vessels. For example, Title 46, Section 8104 of the United States Code specifies:

"(b) On an oceangoing or coastwise vessel of not more than 100 gross tons (except a fishing, fish processing, or fish tender vessel), a licensed individual may not be required to work more than 9 of 24 hours when in port, including the date of arrival, or more than 12 of 24 hours at sea, except in an emergency when life or property are endangered."

"(g) On a towing vessel (except a vessel to which subsection (c) of this section applies), an offshore supply vessel, or a barge to which this section applies, that is engaged in a voyage of less than 600 miles, the licensed individuals and crewmembers (except the coal passers,

firemen, oilers, and water tenders), may be divided, when at sea, into at least 2 watches."

Even more detailed specifications of vessel manning requirements and hours of work can be found in regulations adopted by the Coast Guard and reported in Title 46 of the Code of Federal Regulations.

12. These specifications are reflected in the Certificates of Inspection for Tidewater Western vessels such as *Smith Tide*. That certificate provides that the vessel's normal crew of 2 operators and 2 deckhands may be reduced to 1 operator and 1 deckhand "when the vessel is away from a shoreside dock or safe mooring buoy *for not more than 12 hours in any 24 hour period.*" (Emphasis added.) This specification of hours is consistent with the Coast Guard's interpretation of the requirements of Section 8104 of Title 46, quoted above, that no individual may be required to work more than 12 of 24 hours at sea for vessels of this kind.

13. Historically these offshore vessels operate on a 24 hour a day basis with a normal workday for seamen (including officers) being up to but not exceeding 12 hours per day while the vessel is at sea. The actual number of hours worked (up to 12 hours) is quite flexible and depends upon the operations the vessel is engaged in. In all of the years I have been involved in supervising the manning requirements for crew vessels and supply vessels of the type operated by Tidewater Western and Zapata Pacific, I have

always considered and understood the 12 hour shift to be the normal workday for seamen (including officers) serving on these type vessels.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Dana Point, CA, on October 30, 1993.

/s/ Robert A. Janecek
Robert A. Janecek, USCG (Ret.)